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No. 11761

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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HERMAN H. HELBUSH and MONOGRAM  
MANUFACTURING CO., a corporation,  
Appellants,

vs.

DONALD H. FINKLE, doing business as Wedge-  
lock Company,  
Appellee.

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Transcript of Record  
VOLUME I  
Pages 1 to 276

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Upon Appeal from the District Court of the United States  
for the Southern District of California  
Central Division

FILED

JAN 30 1948

PAUL P. O'BRIEN, CLERK







United States  
| Circuit Court of Appeals  
For the Ninth Circuit

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HERMAN H. HELBUSH and MONOGRAM  
MANUFACTURING CO., a corporation,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

MASON & GRAHAM,  
COLLINS MASON,  
811 West 7th St.,  
Los Angeles 14, Calif.,  
For Appellants.

LYON & LYON,  
FREDERICK W. LYON,  
811 West 7th St.,  
Los Angeles 14, Calif.,  
For Appellee.

In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 5453 O'C

HERMAN H. HELBUSH and  
MONOGRAM MANUFACTURING CO.,  
a Corporation,

Plaintiffs,

vs.

DONALD H. FINKLE, Doing Business as  
WEDGELOCKE COMPANY,  
Defendant.

COMPLAINT FOR INFRINGEMENT OF  
UNITED STATES LETTERS PATENTS

Nos. 2,320,493, 2,364,408 and 2,365,787

Plaintiffs complain of defendant and allege:

I.

That plaintiff, Herman H. Helbush, is a resident of Los Angeles, County of Los Angeles, State of California, within the Southern District of California, Central Division;

That plaintiff, Monogram Manufacturing Co., is a California corporation maintaining a regular place of business in the County of Los Angeles, State of California, within the Southern District of California, Central Division;

II.

That defendant, Donald H. Finkle, is a resident of and maintains a regular place of business, under



the name and style of [2\*] Wedgeloek Company, in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

### III.

That jurisdiction of this Court arises under the patent laws of the United States because of infringement of United States Letters Patents Nos. 2,320,493, 2,364,408 and 2,365,787 by defendant, which infringement has been and is being carried out by defendant within the Southern District of California, Central Division and elsewhere in the United States.

### IV.

That on June 1, 1943, United States Letters Patent No. 2,320,493 was duly and legally issued to plaintiff, Herman H. Helbush, for an invention in Clamp.

### V.

That on December 5, 1944, United States Letters Patent No. 2,364,408 was duly and legally issued to plaintiff, Herman H. Helbush, for an invention in Sheet Metal Clamp.

### VI.

That on December 26, 1944, United States Letters Patent No. 2,365,787 was duly and legally issued to plaintiff, Herman H. Helbush, for an invention in Clamp.

### VII.

That since the respective dates of issuance of

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

said United States Letters Patents Nos. 2,320,493, 2,364,408 and 2,365,787 plaintiff, Herman H. Helbush, has been and still is the owner thereof and plaintiff, Monogram Manufacturing Co., possesses an exclusive license to manufacture, use and sell devices covered by said Letters Patents, and has been and still is engaged in the active manufacture and sale thereof and has at all times been able to supply the demand therefor. [3]

#### VIII.

That defendant has for some time past, and still is, infringing claims 1 to 7, inclusive, of said Letters Patent No. 2,320,493, claims 1 and 2 of said Letters Patent No. 2,364,408, and claim 11 of said Letters Patent No. 2,365,787, by making, using and selling clamp devices embodying the inventions patented thereby and will continue to do so unless enjoined by this Court.

#### IX.

That plaintiff, Monogram Manufacturing Co., has placed the required statutory notice on all devices manufactured and sold by it under said respective Letters Patents.

#### X.

That defendant's said infringing acts have been and are wilful and deliberate.

Wherefore, plaintiffs pray:

1. For a preliminary and final injunction against further infringement by defendant and those controlled by defendant.

2. For an accounting of profits and damages arising out of or caused by said infringements.
3. For the trebling of damages suffered by plaintiffs by virtue of said deliberate and wilful infringement.
4. For plaintiffs' costs incurred herein.
5. For such other relief as to the Court may seem just and proper in the premises. [4]

Dated this 24th day of May, 1946.

HERMAN H. HELBUSH,  
MONOGRAM MANUFACTUR-  
ING CO., a Corporation,  
Plaintiffs,

By MASON & GRAHAM,  
/s/ COLLINS MASON,  
Attorneys for Plaintiffs.

Verification

State of California,  
County of Los Angeles—ss.

Herman H. Helbush, being by me first duly sworn, deposes and says: that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon



information or belief, and as to those matters that he believes it to be true.

/s/ HERMAN H. HELBUSH.

Subscribed and sworn to before me this 24th day of May, 1946.

[Seal] /s/ LINNE CORD,  
Notary Public in and for said County and State.  
My Commission Expires Feb. 17, 1947.

[Endorsed]: Filed Jan. 10, 1946. [5]

---

[Title of District Court and Cause.]

AMENDED ANSWER TO COMPLAINT  
AND COUNTERCLAIM

Comes now the defendant, Donald H. Finkle, doing business as Wedgelock Company, and with regard to the Complaint filed herein answers, denies and alleges as follows:

1.

Answering Paragraphs I, II and III of said Complaint, defendant admits all the allegations thereof except that he specifically denies any acts of infringement have been committed by said defendant.

2.

Answering Paragraphs IV, V and VI, defendant denies each and every allegation thereof and leaves plaintiffs to their proofs thereof. [6]

3.

Answering Paragraph VII, defendant is without knowledge of the facts therein alleged and therefore denies said facts and leaves plaintiffs to their proofs thereof.

4.

Answering Paragraphs VIII, IX and X, defendant denies each and every allegation thereof and leaves plaintiffs to their proofs thereof.

Further answering said Complaint herein and for separate, alternate and further defenses, defendant alleges:

5.

That pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 were not granted by the Commissioner of Patents within the authority granted him under due form of law or after due proceedings were had with respect to the applications filed by or on behalf of Frank C. Wallace; that said pretended Letters Patent were irregularly granted without proper or due consideration of the applications for said pretended Letters Patent.

6.

That defendant has not infringed said pretended Letters Patent or any claim or claims thereof.

7.

That Frank C. Wallace was not the original or first inventor of that which is alleged to be patented in said pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 in suit, or any material or

substantial part thereof, but on the contrary, prior to the supposed invention thereof the thing or things alleged to be patented by said pretended Letters Patent, and particularly that which is described in the pretended claims thereof, and all material and substantial parts thereof, have been [7] patented or described in each of the following Letters Patent, or the applications therefor, and that the description contained in said pretended Letters Patent and each and all of the pretended claims thereof had been published as a printed publication, the numbers of said prior Letters Patent, the names of the patentees thereof and the dates of said Letters Patent being as follows:

United States Letters Patent

Patentee	Number	Date
De Mooy.....	2,159,655	May 23, 1939
De Mooy.....	2,269,188	Jan. 6, 1942
Wallace .....	2,266,929	Dec. 23, 1941
Wallace .....	2,271,879	Feb. 3, 1942
Roe .....	2,188,450	Jan. 30, 1940
Webb .....	2,256,634	Sept. 23, 1941
Rogers .....	2,276,344	Mar. 17, 1942

British Letters Patent

A.T.S. Company .....	413,403	Feb. 7, 1934
Rocroy .....	443,683	Mar. 4, 1936

and further Letters Patent which this defendant has not yet located and for which this defendant is diligently searching and prays leave to add to this answer.

8.

Defendant further alleges upon information and belief that prior to any supposed invention or dis-



covery by Herman H. Helbush, that which is alleged to be patented in and by the pretended Letters Patent 2,320,493 2,364,408 and 2,365,787, and particularly that which is described and claimed therein, and all material and substantial parts thereof, had in the United States been invented, used by, or known to, each of the persons whose names, places of invention, knowledge of use and residences are as follows:

(a) Each and every patentee mentioned in the preceding [8] paragraph, residing at the places indicated in the respective patents and at the places stated as the places of residence of the respective patentees;

(b) Donald H. Finkle, George H. Finkle, Ralph H. Head and Hiram Stewart Clark, all of Los Angeles, California; and others whose names and addresses this defendant has not yet learned and for which this defendant is diligently searching and prays leave to add to this answer.

9.

That in view of the state of the art at and before the alleged invention or inventions of the pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787, or attempted to be defined in the claims, or any claim of said pretended Letters Patent, said claims or any of them cannot now be so interpreted as to bring within their purview as an infringement thereof any clamp manufactured or sold by defendant.

## 10.

That while the alleged applications for the pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 were pending in the United States Patent Office, the applicant therefor so limited and confined the claims of said alleged applications under the requirements of the Commissioner of Patents that plaintiff cannot now seek for or obtain a construction for any claim of said pretended Letters Patent sufficiently broad to cover any fastener manufactured or sold by defendant.

## 11.

That defendant further alleges that the alleged invention of pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787, in view of the state of the art as it existed at the date of the alleged invention or inventions, does not involve invention or contain any patentable novelty but consists in the mere adaptation of well-known methods, devices and compositions of matter for the required [9] uses involving merely the skill expected of one in the art to which said pretended Letters Patent pertains.

## 12.

That defendant further alleges that the description of the alleged invention or inventions of the specifications of the pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 is not in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it pertains, or with which it is most clearly connected, to make, compound or use the same.

### Counterclaim

Counterclaim complains of counter defendant and alleges:

#### A.

That counter claimant Donald H. Finkle is a resident of and maintains a regular place of business under the name and style of Wedglock Company in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

#### B

That counter defendant Herman H. Helbush is a resident of Los Angeles, County of Los Angeles, State of California, within the Southern District of California, Central Division.

#### C.

That counter defendant Monogram Manufacturing Co. is a California corporation maintaining a regular place of business in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

#### D

That jurisdiction of this Court arises under the patent laws of the United States because of infringement of United States Letters Patent No. 2,393,088 by counter defendants, which infringement has been and is being carried out by counter defendants within the Southern District of California, Central Division, and elsewhere [10] in the United States.



## E

That on January 15, 1946, United States Letters Patent No. 2,393,088 was duly and legally issued to Hiram Stewart Clark and Carlos S. Head for an invention in fasteners.

## F

That counter claimant is the owner of said Letters Patent No. 2,393,088 and has been and still is engaged in the active manufacture and sale of fasteners described and claimed in said Letters Patent and has at all times been able to supply the demand therefor.

## G.

That counter defendants have for some time past, and still are, infringing Claims 1 to 8, inclusive, of said Letters Patent No. 2,393,088 by making, using and selling fastener devices embodying the invention patented thereby, and will continue to do so unless enjoined by this Court.

## H.

That counter claimant has placed the required statutory notice on all devices manufactured and sold by him under said Letters Patent.

## I.

That counter defendants' said infringing acts have been and are wilful and deliberate.

Wherefore, defendant-counter claimant prays:

1. That a decree be issued out of this Court decreeing said Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787 and the respective claims thereof invalid and void.

2. That a decree be issued out of this Court decreeing that the defendant has not infringed any claim of said pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787.

3. That defendant be awarded its costs herein.

4. For a preliminary and final injunction against the plaintiffs, their agents and representatives, from further representing to the trade and particularly to defendant's customers that clamps manufactured by defendant are an infringement of, and that any use by said trade or customers is an infringement of, said pretended Letters Patent Nos. 2,320,493, 2,364,408 and 2,365,787, and that damages be awarded defendant because of plaintiffs' representations to the trade and to defendant's customers.

5. For a preliminary and final injunction against further infringement by counter defendants, or those controlled by counter defendants, of counter claimant's Letters Patent No. 2,393,088.

6. For an accounting of profits or damages arising out of or caused by said infringement, for the trebling of damages suffered by counter claimant by virtue of said wilful and deliberate infringement, for counter claimant's costs incurred herein, and



for such other relief as to the Court may seem just and proper in the premises.

Dated at Los Angeles, California, this 12th day of September, 1946.

LYON & LYON,  
/s/ FREDERICK W. LYON,  
Attorneys for Defendant-  
Counter Claimant.

It Is Hereby Stipulated by and between counsel for the respective parties that the above Amended Answer to Complaint and Counterclaim may be filed in this case.

/s/ FREDERICK W. LYON,  
/s/ COLLINS MASON.

Approved and so ordered, this Sept. 13th, 1946.  
/s/ PAUL J. McCORMICK,  
Judge.

[Endorsed]: Filed Sept. 13, 1946. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy Clerk.

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[Title of District Court and Cause.]

ANSWER TO AMENDED  
COUNTERCLAIM

Comes now the plaintiffs and for answer to defendant's amended counterclaim admit, deny and allege as follows:

## I.

Admit the allegations of paragraphs A, B and C.

## II.

Answering paragraph D, admit that jurisdiction of this Court arises under the patent laws of the United States, but deny each and every remaining allegation of said paragraph.

## III.

Answering paragraph E, admit that United States Letters Patent No. 2,393,088 issued to Hiram Stewart Clark and Carlos S. Head on January 15, 1946, but deny that the same was duly or legally issued. [13]

## IV.

Plaintiffs are without knowledge, information or belief as to the allegations of paragraph F and therefor deny the same.

## V.

Deny each and every of the allegations of paragraphs G, H and I.

## VI.

Further answering said counterclaim, plaintiffs allege that said United States letters patent No. 2,393,088 and each and every claim thereof is invalid and void because:

(a) The alleged invention described and claimed therein does not constitute patentable novelty within the meaning of the patent law in view of the prior state of the art to which

the subject matter relates and in view of what was common knowledge on the part of those skilled in the art all prior to the date of the said alleged invention;

(b) The alleged invention or improvement and all material and substantial parts thereof claimed as new in said Letters Patent No. 2,393,088 was, before the alleged invention or discovery thereof by said Hiram Stewart Clark and Carlos S. Head, known to others and, more than one year prior to the filing of their application for said patent, was described and patented in United States Letters Patent as follows, to-wit: [14]

2,161,464	June 6, 1939	G. F. L. Gilbert
2,248,882	July 8, 1941	E. B. Lear
2,256,243	Sept. 16, 1941	R. W. Edwards
2,271,012	Jan. 27, 1942	J. H. Hutchings
2,276,344	Mar. 17, 1942	G. D. Rogers
2,292,498	Aug. 11, 1942	F. C. Wallace
2,356,619	Aug. 26, 1944	J. Rossi et al.
2,369,410	Feb. 13, 1945	P. R. Rossman

and in other Letters Patent which are at present unknown to plaintiffs but for which they are diligently searching and, when found, they will pray leave to insert in this answer;

(c) The said alleged invention or improvement or all material and substantial parts thereof claimed as new in said Letters Patent No. 2,393,088 had been in public use or on sale in this country for more than one year prior to the original application for said Letters Patent by the parties named in the patents enumerated



in paragraph (b) hereof, at the places named in the said patents as being the residences of the respective parties, and by the following persons or firms;

Monogram Manufacturing Co., Los Angeles, California,

Scovill Manufacturing Co., Waterbury, Connecticut.

(d) The said alleged invention or improvement or all material and substantial parts thereof claimed as new in said Letters Patent No. 2,393,088 was known and used by others in this country before the alleged invention thereof by the said Hiram Stewart Clark and Carlos S. Head, by persons and firms whose names and places of residence or use are specified in paragraphs (b) and (c) hereof and by others whose names and places of residence are at present unknown to plaintiffs but for which they are diligently searching and, when found, they will pray leave to insert in this answer. [15]

## VII.

Further answering said counterclaim, plaintiffs allege that in view of the state of the art at and before the alleged invention of said Letters Patent No. 2,393,088, or attempted to be defined in the claims thereof, said claims cannot now be so interpreted as to bring within their purview as an infringement thereof any device manufactured or sold by plaintiffs or either of them.

## VIII.

Further answering said counterclaim, plaintiffs allege that while the application for said Letters Patent No. 2,393,088 was pending in the United States Patent Office, the applicants therefor so limited and confined the claims thereof under the requirements of the Commissioner of Patents that counter claimant cannot now seek for or obtain a construction for any claim of said Letters Patent sufficiently broad to cover any device manufactured or sold by plaintiffs or either of them.

## IX.

Further answering said counterclaim, plaintiffs further allege that the description of the alleged invention of said Letters Patent No. 2,393,088 is not in such full, clear, concise and exact terms as to enable any person skilled in the art to which it relates, or with which it is connected, to make or use the same.

Wherefore, plaintiffs-counter defendants pray:

1. For a decree dismissing plaintiffs counterclaim.
2. For a decree adjudging United States Letters Patent No. 2,393,088 and each and every of the claims thereof, invalid and void. [16]
3. For a decree adjudging that plaintiffs have not infringed any claim of said United States Letters Patent No. 2,393,088.
4. For a decree awarding plaintiffs their costs herein.

5. For a decree granting to plaintiffs such other and further relief as may be just and equitable.

Dated at Los Angeles, California, this 20th day of September, 1946.

MASON & GRAHAM,  
/s/ COLLINS MASON,  
Attorneys for Plaintiffs-  
Counter Defendants.

[Endorsed]: Filed Sept. 23, 1946. [17]

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[Title of District Court and Cause.]

DISMISSAL

It Is Hereby Stipulated, by and between the parties to this action, through their respective attorneys, that this action may be and the same is hereby dismissed without prejudice and without costs as to plaintiffs' United States Letters Patent in suit No. 2,320,493 and as to defendant's counterclaim for infringement of United States Letters Patent No. 2,393,088.

Dated this 15th day of January, 1947.

MASON & GRAHAM,  
/s/ C. W. MASON,  
Attorneys for Plaintiffs.

LYON & LYON,  
/s/ FREDERICK W. LYON,  
Attorneys for Defendant.

It Is So Ordered this 22 day of January, 1947.

/s/ J. F. T. O'CONNOR,  
U. S. District Judge.

Judgment entered and docketed Jan. 22, 1947.  
Book 41, Page 425.

[Endorsed]: Filed Jan. 22, 1947.



[Title of District Court and Cause.]

### STIPULATION

The parties hereto, through their respective attorneys, hereby stipulate that the annexed supplemental complaint of plaintiffs herein shall be filed herein pursuant to order of Court made during the trial of this action.

It is further stipulated that it may be deemed that defendant, Wedgelock Company, a corporation, named as a defendant in said supplemental complaint, has answered said supplemental complaint denying that it has infringed, is infringing or intends to continue to infringe claim 11 of United States Letters Patent in suit No. 2,365,787 or claims 1 and 2 of United States Letters Patent in suit No. 2,364,408, and incorporating paragraphs numbered 7 to 12, inclusive, as well as the prayer, of the amended answer of defendant, Donald H. Finkle, doing business as Wedgelock Company, heretofore [19] filed herein, insofar as said answer relates to said claims of the hereinabove identified United States Letters Patents in suit.

Dated this 24th day of January, 1947.

MASON & GRAHAM,

/s/ C. W. MASON,

Attorneys for Plaintiffs.

LYON & LYON,

/s/ FREDERICK W. LYON,

Attorneys for Defendant.

It Is So Ordered this 5 day of February, 1947.

/s/ J. F. T. O'CONNOR,

Judge.

[Endorsed]: Filed Feb. 5, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT FOR IN-  
FRINGEMENT OF UNITED STATES  
LETTERS PATENTS NOS. 2,365,787  
(CLAIM 11) AND 2,364,408 (CLAIMS 1  
AND 2)

Plaintiffs, Herman H. Helbush, a resident of Los Angeles, County of Los Angeles, State of California, and Monogram Manufacturing Company, a California corporation having a regular place of business in the County of Los Angeles, State of California bring this their supplemental complaint against Wedgelock Company, a corporation of California and a citizen of said state, and allege:

1. That said defendant, Wedgelock Company, is a corporation organized and existing under the laws of the State of California, is a citizen of said state, and has a regular place of business in the City of Los Angeles, County of Los Angeles, State of California. [21]

2. That on June 10, 1946, plaintiffs filed their original complaint herein against Donald H. Finkle, doing business as Wedgelock Company, charging said defendant with infringement of claim 11 of United States Letters Patent No. 2,365,787 and claims 1 and 2 of United States Letters Patent No. 2,365,408, and praying for an injunction against further infringement thereof and for an accounting of profits and damages accruing to plaintiffs by reason of such infringement.

3. That said defendant, Wedgelock Company, a corporation, was organized in or about the month of January, 1947, subsequent to the filing of the original complaint herein; that said defendant, Wedgelock Company, a corporation, did, on or about said date, acquire the assets, property and business of said Donald H. Finkle, doing business as Wedgelock Company, theretofore employed by said defendant, Donald H. Finkle, doing business as Wedgelock Company, in carrying out the infringement alleged by said original complaint, and said defendants, Wedgelock Company, a corporation, has since conducted, is now conducting and threatens to continue to conduct the said business formerly carried on by said defendant, Donald H. Finkle, doing business as Wedgelock Company.

4. That said defendant, Wedgelock Company, a corporation, has infringed, is now infringing and threatens to continue to infringe upon said claims of said Letters Patents and each thereof by making, using and selling clamp devices embodying the inventions thereof.

5. That said defendant, Wedgelock Company, a corporation, has assumed and conducted the defense of said action against said defendant, Donald H. Finkle, doing business as Wedgelock Company.

6. That plaintiffs are informed and believe and therefore allege that they are entitled to the same relief against the said [22] Wedgelock



Company, a corporation, as they might have had if the facts herein above stated and charged by way of supplement had been stated in plaintiff's said original complaint.

Wherefore, plaintiffs pray:

1. For a preliminary and final injunction against further infringement by said defendant, Wedgeloek Company, a corporation and those controlled by it.

2. For an accounting of profits and damages arising out of or caused by said infringement.

3. For the trebling of damages suffered by plaintiffs by virtue of said deliberate and wilful infringement.

4. For plaintiffs' costs incurred herein.

5. For such further relief as to the Court may seem just and proper in the premises.

Dated this 24th day of January, 1947.

H. H. HELBUSH,  
MONOGRAM MAUNFACTUR-  
ING CO, a corporation,

By MASON & GRAHAM,  
/s/ C. W. MASON,  
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 5, 1947.

At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 18th day of February in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable J. F. T. O'Connor,  
District Judge.

[Title of Cause.]

Minute Order, February 18, 1947

PREPARE FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND JUDGMENT

This case having come before the Court for trial and ordered submitted, upon consideration whereof the Court now finds that the defendant has not infringed. Counsel for the defendant, F. W. Lyon, Esq., is ordered to prepare findings of fact and conclusions of law and judgment within ten days.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on for trial and the court, having heard the evidence and considered the stipulation of the parties, finds the facts and states the conclusions of law as follows:

1. That plaintiff, Herman H. Helbush is a resi-

dent of Los Angeles, County of Los Angeles, State of California, within the Southern District of California, Central Division.

2. That plaintiff, Monogram Manufacturing Co., is a California corporation, maintaining a regular place of business in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

3. That defendant, Donald H. Finkle, is a resident of and has maintained a regular place of business under the name and style of Wedglock Company, in the County of Los Angeles, State of California, within the Southern District of California, Central Division. [25]

4. That defendant, Wedglock Company, is a corporation, organized and existing under the laws of the State of California, is a citizen of said state and has a regular place of business in the city of Los Angeles, County of Los Angeles, State of California, and within the Southern District of California, Central Division.

5. That the defendant, Wedglock Company, a corporation, was organized on or about the 1st day of January, 1947, subsequent to the filing of the original complaint herein and did, on or about said date, acquire the aforesaid property and business of said Donald H. Finkle, doing business as Wedglock Company, and has since conducted and is now conducting said business.

6. That Herman H. Helbush, plaintiff herein, has been, and still is, the owner of all right and title to the United States Letters Patent No. 2,364,408.



7. That Herman H. Helbush, plaintiff herein, has been, and still is, the owner of all right and title to the United States Letters Patent No. 2,365,787.

8. That Monogram Manufacturing Co., plaintiff herein, has the exclusive right to manufacture, sell and use the invention of said United States Letters Patent No. 2,364,408.

9. That Monogram Manufacturing Co., plaintiff herein, has the exclusive right to manufacture, sell and use the invention of said United States Letters Patent No. 2,365,787.

10. That defendant, Donald H. Finkle, has been engaged in the manufacture and sale of sheet metal clamps or clamps prior to and subsequent to the issuance of said Letters Patent.

11. That the defendant, Wedglock Company, a corporation, has been engaged in the manufacture and sale of sheet metal clamps or clamps, subsequent to the issuance of said Letters Patent.

12. That Donald H. Finkle, defendant, has not infringed United States Letters Patent No. 2,364,-408.

13. That Donald H. Finkle, defendant, has not infringed [26] United States Letters Patent No. 2,365,787.

14. That Wedglock Company, a corporation, has not infringed United States Letters Patent No. 2,364,408.

15. That Wedglock Company, a corporation, has not infringed United States Letters Patent No. 2,365,787.

16. That United States Letters Patent No. 2,365,787 discloses a clamp which includes a combination of: a longitudinally split pin mounted in a body to reciprocate through a hole in an end wall of the body, a spring urging the pin inwardly of the body, a T-shaped spreader having its cross portion mounted between the legs of said split pin upon the outer end wall of the body, and a cap attached to the side walls and extending over the end wall of the body to hold the T-shaped spreader in position on the outside of the end wall.

17. That United States Letters Patent No. 2,365,787 were issued by the Patent Office only after the applicant therefor had limited said patent to a construction in which the body member has an integral end wall and with a hole therethrough for the passage of the split pin and a cover cap over this end wall to hold a T-shaped spreader in position between said cap and said end wall.

18. That British Patent No. 413,403, issued to A. T. S. Company, February 7, 1934, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that said British patent does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

19. That British Patent No. 443,683, issued to Rocroy Company, July 2, 1935, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that said Brit-

ish patent does not describe an end cap for holding a T-shaped spreader on the outside [27] of an end wall of the body of said clamp and against the end wall.

20. That United States Letters Patent No. 2,136,875, issued to Blanc, November 15, 1938, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that United States Letters Patent No. 2,136,875 does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

21. That United States Letters Patent No. 2,159,655, issued to De Mooy, May 23, 1939, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that United States Letters Patent No. 2,159,655 does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

22. That United States Letters Patent No. 2,269,188, issued to De Mooy, January 6, 1942, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,365,787, except that United States Letters Patent No. 2,269,188 does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.



~~23. That in view of the above set forth prior patents, and the ruling of the Patent Office as above set forth, the patent in suit, United States Letters Patent No. 2,365,787, must be limited in its scope to include a body member with an integral end wall and a cover cap surrounding said end wall and holding a T-shaped spreader on the outside of said end wall and inside of said cover cap.~~

~~(O'Connor, Judge)~~

24. That the clamps manufactured, used and sold by the defendants, Donald H. Finkle and the Wedgeloek Company, a corporation, [28] do not include an end cap for holding a T-shaped spreader on the outside end wall of the body of said clamp and against the end wall.

25. That the clamps manufactured, used, and sold by defendants have a two-piece body with the T-shaped spreader positioned inside of the body.

~~26. That the method of assembly of defendants' clamps is totally different from any manner of assembly possible in United States Letters Patent No. 2,365,787.~~

27. That United States Letters Patent No. 2,364,408 discloses a clamp which differs from United States Letters Patent No. 2,365,787 only in the provision of a shoulder on the body and an interlocking shoulder on the plunger attached to the longitudinally split pin to prevent the split pin and plunger from being hurled from the body upon breaking of the split pin.

28. That British Patent No. 413,403, issued to ~~A. T. S. Company, February 7, 1934, describes and~~

Illustrates a clamp (for the same purpose and with identical mechanical construction as) United States Letters Patent No. 2,364,408, except that said British patent does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

29. That British Patent No. 443,683, issued to Rocroy Company, July 2, 1935, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,364,408, except that said British patent does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

30. That United States Letters Patent No. 2,136,875, issued to Blanc, November 15, 1938, describes and illustrates a clamp for the same purpose and with identical mechanical construction as [29]

United States Letters Patent No. 2,364,408, except that said United States Letters Patent No. 2,136,875 does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

31. That United States Letters Patent No. 2,159,655, issued to De Mooy, May 23, 1939, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,364,408, except

that said United States Letters Patent No. 2,159,655 does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

32. That United States Letters Patent No. 2,269,188, issued to De Mooy, January 6, 1942, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,364,408, except that said United States Letters Patent No. 2,269,188 does not describe the interlocking shoulder and does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

33. That United States Letters Patent No. 2,256,634, issued to Webb, September 23, 1941, describes and illustrates a clamp for the same purpose and with identical mechanical construction as United States Letters Patent No. 2,364,408, except that said United States Letters Patent No. 2,256,634 does not describe an end cap for holding a T-shaped spreader on the outside of an end wall of the body of said clamp and against the end wall.

34. That in view of the above-set-forth prior patents, the patent in suit, United States Letters Patent No. 2,364,408 must be limited in its scope to include a body member with an end wall, a cover cap surrounding said wall and holding a T-shaped spreader [30] on the outside of said end wall and ~~inside of said end cover. (O'Connor, Judge.)~~



## CONCLUSIONS OF LAW

1. That Claim 11 of United States Letters Patent No. 2,365,787 is not infringed by any clamp manufactured, used, and sold by Donald H. Finkle.

2. That Claim 11 of United States Letters Patent No. 2,365,787 is not infringed by any clamp manufactured, used, and sold by Wedglock Company, a corporation.

3. That Claims 1 and 2 of United States Letters Patent No. 2,364,408 are not infringed by any clamp manufactured, used, and sold by Donald H. Finkle.

4. That Claims 1 and 2 of United States Letters Patent No. 2,364,408 are not infringed by any clamp manufactured, used, and sold by Wedglock Company, a corporation.

~~5. That Claim 11 of United States Letters Patent No. 2,365,787 must be interpreted to include an end cap for holding a T-shaped spreader on the outside end wall of the body of said clamp and against the end wall. (O'Connor, Judge.)~~

~~6. That Claims 1 and 2 of United States Letters Patent No. 2,364,408 must be interpreted to include an end cap for holding a T-shaped spreader on the outside end wall of the body of said clamp and against the end wall.~~

7. That plaintiffs' complaint should be dismissed for want of equity.

Dated at Los Angeles, California, this 20th day of May, 1947.

/s/ J. F. T. O'CONNOR,  
District Judge.

Approved as to form:

LYON & LYON,  
/s/ FREDERICK W. LYON,  
Attorneys for Defendant.

Disapproved as to form:

MASON & GRAHAM,  
/s/ COLLINS MASON,  
Attorneys for Plaintiffs.

March 15, 1947, 10:30 a.m.

[Endorsed]: Filed May 20, 1947.

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In the United States District Court, Southern District of California, Central Division.  
Civil Action No. 5453-O'C

HERMAN H. HELBUSH and  
MONOGRAM MANUFACTURING CO.,  
a corporation,  
Plaintiffs,

vs.

DONALD H. FINKLE, doing business as  
WEDGELOCK COMPANY,  
Defendant.

FINAL JUDGMENT

This cause came on to be heard at final hearing on the pleadings and proof of all parties, and was

briefed and argued by counsel. Thereupon, upon consideration thereof, it is Ordered, Adjudged and Decreed:

1. That Claim 11 of United States Letters Patent No. 2,365,787 has not been infringed by either defendant, Donald H. Finkle or Wedglock Company, a corporation.

2. That Claims 1 and 2 of United States Letters Patent No. 2,364,408 have not been infringed by either defendant, Donald H. Finkle or Wedglock Company, a corporation.

3. That the complaint herein be and the same is hereby dismissed.

4. That the defendants have judgment against the plaintiffs, Herman H. Helbush and Monogram Manufacturing Co. for its [32] necessary costs and disbursements incurred herein, including the Court Reporter's fee and per diems and the cost for the Court's copy of the transcript of record, all in the sum of \$149.10, to be taxed by the Clerk.

5. That the defendants have judgment against the plaintiffs, Herman H. Helbush and Monogram Manufacturing Co. for reasonable



attorneys' fees herein adjudged to be ~~\$1500.00~~  
\$500.00.

Dated at Los Angeles, this 20 day of May, 1947.

/s/ J. F. T. O'CONNOR,  
District Judge.

Approved as to form:

LYON & LYON,  
/s/ FREDERICK W. LYON,  
Attorneys for Defendant.

Disapproved as to form:

MASON & GRAHAM,  
/s/ COLLINS MASON,  
Attorneys for Plaintiffs.

March 10, 1947, 10:30 a.m.

Judgment entered and Docketed May 20, 1947.  
Co. Book 43, Page 261.

[Endorsed]: Filed May 20, 1947.

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[Title of District Court and Cause.]

### NOTICE OF MOTION

To the defendants above named and To Lyon &  
Lyon, Esq., and Frederick W. Lyon:

Please Take Notice that plaintiffs will bring the  
annexed motion for new trial on for hearing before  
this Court, at its court room in the United States  
Courts and Post Office Building, Los Angeles, Cali-

fornia, on Monday, the 9th day of June, 1947, at the hour of 10:00 a.m. or as soon thereafter as the matter may be heard.

Dated this 28th day of May, 1947.

MASON & GRAHAM,  
/s/ C. W. MASON,  
Attorneys for Plaintiffs.

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[Title of District Court and Cause.]

### PLAINTIFFS' MOTION FOR NEW TRIAL

Plaintiffs move the Court as follows:

1. For a new trial and rehearing.
2. For an order vacating the findings of fact, conclusions of law and judgment entered herein on May 20, 1947.

3. For an order entering new findings of fact, conclusions of law and judgment holding claim 11 of patent in suit No. 2,365,787 and claims 1 and 2 of patent in suit No. 2,364,408 valid and infringed.

This motion is based upon Rule 59 of Federal Rules of Civil Procedure and upon the following grounds, points and authorities. [35]

(a) Findings of fact 12-15, 24 and 25 (which are the only findings offered to support the judgment except upon jurisdictional grounds) are not supported by and are directly contrary to the evidence and the facts.

(b) The findings do not support the judgment and do not state the grounds upon which the Court adjudged non-infringement.

Reinharts, Inc. v. Caterpillar Tractor Co.,  
85 Fed. 628.

(c) The findings of fact, conclusions of law and judgment are contrary to law in that they fail to follow the settled rule of law that only the claims of a patent define what the patent grant covers and what is asserted to be infringed.

Reinharts, Inc. v. Caterpillar Tractor Co.,  
*supra*;

Smith v. Snow, 294 U. S. 1, 79 L. Ed. 721;  
Motion Picture Patents v. Universal Film  
Mfg. Co., 243 U. S. 510, 61 L. Ed. 871.

(d) The findings of fact, conclusions of law and judgment are contrary to law in that they fail to follow the settled rule of law that one does not avoid infringement by using a structure which is the full equivalent of the patented structure or by merely calling a part by a different name.

Smith v. Snow, *supra*;

Banker's Utilities Co. v. Pacific National  
Bank, 32 Fed. (2d) 879 (CCA 9);

Jay v. Suetter, 32 F. (2d) 879 (CCA 9).

(e) The judgment is contrary to the law as stated by the Ninth Circuit Court of Appeals in Reinharts, Inc. v. Caterpillar Tractor Co., *supra*, and by the Supreme Court in Smith v. Snow, *supra*.



(f) The judgment awarding attorneys' fees is improper in a case prosecuted in good faith against a persistent and wilful infringer.

### Brief Argument

“The question of infringement is a question of fact.”

Reinharts, Inc. v. Caterpillar Tractor Co.,  
supra.

Consequently, findings of fact should recite facts supporting the judgment of non-infringement and should recite facts which would enable an appellate tribunal to determine upon what grounds the judgment is based.

Findings 12-15, 24 and 25 are the only findings offered to support the judgment of the non-infringement. The remaining findings relate only to jurisdictional matters. Of the specified findings it is submitted that those numbered 12-15, inclusive, are nothing more than conclusions of law, reading as follows:

“12. That Donald H. Finkle, defendant, has not infringed United States Letters Patent No. 2,364,408.

“13. That Donald H. Finkle, defendant, has not infringed United States Letters Patent No. 2,365,787.

“14. That Wedglock Company, a corporation, has not infringed United States Letters Patent No. 2,364,408.

“15. That Wedglock Company, a corporation, has not infringed United States Letters Patent No. 2,365,787.” [37]

It is obvious, therefore, that those findings do not recite facts supporting the judgment of non-infringement and certainly an appellate court could not determine from those findings upon what grounds the judgment was based.

Finding 25 reads as follows:

“25. That the clamps manufactured, used, and sold by defendants have a two-piece body with the T-shaped spreader positioned inside of the body.”

It is submitted that this finding is entirely immaterial, being a mere play upon words. The defendant's devices, as well as the patented devices, include a cylindrical body with a cap attached to its outer end by means of the skirt of the cap being crimped onto the body periphery. Whether one calls that construction a “two-piece body” or “a body with an attached cap” is immaterial. In substance the terms are the same and in determining questions of infringement the courts are interested only in the substance. The purpose of the cap in the defendant's structure as well as in the patented structure is to permit the mounting of the spreader from the outer end of the body, to hold the spreader against outward escape from the body, and to provide a smooth work-engaging surface. The law would be entirely meaningless if one could avoid infringement simply by calling a part by a different name.

The only remaining one of those findings is that numbered 24, reading as follows:

“24. That the clamps manufactured, used and sold by the defendants, Donald H. Finkle and the Wedgeloek Company, a corporation, do not include an end cap for holding a T-shaped spreader on [38] the outside end wall of the body of said clamp and against the end wall.”

Even this finding lends no support to the judgment unless it is construed to imply that the patent claims in issue are all necessarily limited to a clamp structure wherein an attached end cap holds a T-shaped spreader on the outside and against the body end wall.

As will be pointed out hereinafter, claims 1 and 2 of patent in suit No. 2,364,408 certainly cannot validly be so construed because that patent does not even disclose an end wall on the body. It has an open-ended body with a washer or ring interposed between the spring and spreader precisely as is used by defendant. And no valid reason exists to so constructed claim 11 of patent in suit No. 2,365,787 because the claim does not include an end wall as an element and an end wall is neither necessary for operability or novelty.

#### Re Patent in Suit No. 2,364,408.

For purposes of this argument it will suffice to quote only claim 2 of this patent, as follows:



“2. A sheet metal clamp comprising, in combination,

a cylindric body,

an end cap mounted on the body in position closing the outer end thereof said cap presenting an opening therethrough and a work-engaging outer surface

a plunger reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,

a spreader member having a laterally projecting inner end portion disposed in the cap and an outer end portion projecting outwardly through said opening in engagement with the work-engaging member,

an inwardly disposed flange on the inner surface of the body adjacent its inner end,

a coil spring in the body around and retractively engaging the plunger and tool-operated means for protracting the plunger against the pressure of said spring comprising a plunger engaging member reciprocally mounted in and projecting from the inner end of the body for manual engagement, said member having a relatively increased diameter inner end portion engageable against said flange when the plunger is in fully retracted position.”

There is no mention of a body end wall in the claim. On the contrary, in describing the end cap

the claim states that the cap is “mounted on the body in position closing the outer end thereof.” This necessarily means that the end of the body is open except for the end cap and if the body has an end wall it could not be open.

Even in the specific embodiment of the invention illustrated in the patent drawings, the body is open at both ends until closed at its outer end by the end cap. The patent drawing shows a washer or ring interposed between the spring and spreader precisely as is used by the defendant’s clamp. [40]

Thus, even if the ring or washer shown in the drawings of patent in suit No. 2,364,408 could be called an end wall, defendant’s clamps also have an end wall and infringe.

In patent law it is fundamental that only the patent claims define what the invention is that is covered by the patent grant and what is asserted to be infringed. The claims are like the metes and bounds clause of a deed. While a patentee illustrates one specific embodiment of his invention in the patent drawings, he does not have to include all the illustrated elements in all the claims or to limit all the claims to the specific embodiment.

“A patentee may, however, describe all the devices in his machine or manufacture, and instead of claiming all or any particular portion of them in combination, may claim so much of the described mechanism as produces a particular described result.”

“Walker on Patents”, Deller’s Edition, page 1697.

“Structures which are designed morely for the purpose of evading the spirit of the invention, but which contain all the elements of the claims, are infringements of the patent.”

“Walker on Patents”, *supra*, page 1690.

“These (the claims) so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute.”

*Motion Picture Patents v. Universal Film Mfg. Co., supra.*

In Exhibit A attached hereto claim 2 of patent in suit No. 2,364,408 is quoted and read, by appropriate reference characters, upon defendant's clamp, Exs. 11 and 17, as well as upon the specific clamp structure illustrated in the patent drawings.

Plaintiffs' expert has read those claims upon defendant's said clamps in the most minute detail, (R. 81). This evidence is not refuted because defendant's expert admitted that, in his analysis of the patent, he had not considered the claims at all. (R. 232).

Thus, there is no basis whatsoever for construing the claims of patent in suit No. 2,364,408 to include a body end wall. Not only do the claims fail to



recite an end wall but, if they did, it would be contrary to the disclosure of the patent.

Moreover, even if the disclosure of the patent would support such an interpretation, it would be contrary to law to read an end wall element into the claims when the claims do not call for one and when an end wall is not necessary to operability or novelty.

In the Ninth Circuit Court of Appeals case of *Reinharts, Inv. v. Caterpillar Tractor Co.*, *supra*, the patent involved a tractor. The specification of the patent described it as a "frameless" tractor, although the particular claim of the patent in the issue made no mention of the structure being frameless. In holding that the claim could not be interpreted to include an element which it did not recite, even though the element was described in the specifications, the Court said: [42]

"Appellant contends that the tractor described in the Wickersham specification is a 'frameless' tractor, and that the accused tractor is not of that type and, therefore, cannot be said to infringe the Wickersham patent. This contention must fail. Wickersham's invention is defined, not by the specification, but by the claims of his patent. *Smith v. Snow*, 294 U. S. 1, 11, 55 S. Ct. 279, 79 L. Ed. 721; *Altoona Public Theatres v. American Tri-Ergon Corporation*, 294 U. S. 477, 487, 55 S. Ct. 455, 79 L. Ed. 1005; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, *supra*, 210 U. S. 405, at page 419, 28 S. Ct. 748, 52 L. Ed. 1122. There is in

the claims no mention of a 'frameless' tractor. That expression is merely appellant's characterization of a tractor having, instead of the usual frame, a central body member comprising a combined engine and transmission case, as described above. Furthermore, it appears from the evidence that appellant's tractor has, instead of the usual frame, a central body member substantially identical with that described in the Wickersham specification. Hence, if Wickersham's is a 'frameless' tractor, so also is the tractor sold by appellant."

In the Supreme Court case of *Smith v. Snow*, *supra*, the patent involved a method for incubating eggs. The patent specification stated that, in the preferred method of carrying out [43] the invention, the eggs should be arranged in a particular manner in the machine, although the patent claims did not include any such requirement. The defendant urged that the claims must be interpreted to be limited to the particular manner of arranging the eggs described in the specification although the claims did not recite this element. In denying this construction of the claim, the Supreme Court said:

"We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor's method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use since the claims of the patent,

not its specifications, measure the invention. Paper Bag Patent case (Continental Paper Bag Co. v. Eastern Paper Bag Co.) 210 U. S. 405, 419, 52 L. Ed. 1122, 1128, 28 S. Ct. 748; McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 116, 40 L. Ed. 358, 361, 16 S. St. 240; Winans v. Denmead, 5 How. 330, 343, 14 L. Ed. 717, 722. While the claims of a patent may incorporate the specifications or drawings by reference, see *Snow v. Lake Shore & M. S. R. Co.*, 121 U. S. 617, 630, 30 L. Ed. 1004, 1008, 7 S. Ct. 1343, and thus limit the patent to the form described in the specifications, it is not necessary to embrace in the claims or describe in the specifications all possible forms in which the claimed principle may be reduced to practice.” [44]

Patents should be construed liberally and, under the rule *ut res magis valeat quam pereat*, they should be interpreted so as to uphold and not destroy the right of the inventor. It is improper for a court, in order to allow an infringer to escape the consequences of his act, to construe a patent claim as including an element which it does not mention and which is not necessary to operability.

In line with the well-settled doctrine of equivalence, the Court should have held defendant's clamps Exs. 11, 11a and 17 to infringe claims 1 and 2 of patent in suit No. 2,364,408 even if the Court elected to call the ring or washer interposed between the spring and spreader an “end wall”, because the de-



fendant's devices are precisely like the patented devices in this and in all other material respects.

Banker's Utilities Co. v. Pacific National Bank, *supra*;

Jay v. Suetter, *supra*;

Re Patent in Suit No. 2,365,787.

For the same reasons and according to the well-settled law hereinbefore discussed, claim 11 of patent in suit No. 2,365,787 cannot lawfully be construed to necessarily include a body end wall. This claim reads as follows:

"11. A clamp for holding perforated sheets together in superposed relation, comprising a cylindrical body,

a laterally flexible retaining member reciprocally mounted in the body for protraction and retraction through the outer end of the body, a spreader bar having lateral sliding engagement with the retaining member, said spreader having an angularly disposed inner end portion, and

means for holding the spreader bar against outward longitudinal movement relative to the body, the last-named means consisting of a cover cap having a cylindrical skirt secured to the outer end portion of the body periphery and an end wall whose inner surface provides an abutment for the angular portion of the spreader bar and whose outer surface provides a sheet-engaging portion."

In Exhibit B annexed hereto this claim is read

upon defendant's clamps Exhibits 11, 11a, 17, 12, 12a, 18 and upon the clamp illustrated in the patent drawings. Plaintiffs' expert also read the claim upon defendant's structure in every detail (R. 72.) and this was not refuted by defendant's expert.

The specific embodiment of the invention shown in the drawings of this patent does have an end wall formed integral with the body of the clamp. However, as plaintiffs' expert pointed out (R. 72) this is merely an abutment to prevent the end of the spring from bearing directly against the spreader, which is also the purpose of the washer used in defendant's clamps. The important consideration is that the claim does not call for a body end wall and it is improper to read into the claim an element which it does not call for and which is not necessary to operability or novelty. [46]

#### Allowance of Attorneys' Fees Is Improper

When this action was filed, the patent statute contained no provision for allowance of attorneys' fees to a successful litigant.

In August 1946 the patent statute (35 USCA 70) was amended to read as follows:

“The Court may in its discretion award reasonable attorneys' fees to the prevailing party upon the entry of judgment on any patent case.”

While we find no decisions interpreting this recent, new provision, inasmuch as such allowance was expressly made discretionary instead of manda-

tory, it is submitted that the practice followed by the courts in applying their discretionary power granted by the patent statute relating to trebling of damages in cases of wilful infringement (35 USCA 67), is pertinent to this new provision.

It has been only in the most flagrant and wilful infringement cases that the courts have exercised this discretionary power to treble damages. The rule is summed up in 35 USCA 365, with citation of cases, as follows:

“If the infringement is deliberate and intentional or wanton and persistent, damages will be increased by the Court, but generally not unless such is the case.”

Typical of the language of the decisions on this point is that in *T. L. Smith Co. v. Cement Tile Machinery Co.*, 258 F. 636, 638, Cert. denied 250 U. S. 659, as follows: [47]

“There is no evidence or claim that the infringing structures were wantonly or wilfully made by the defendant to injure the plaintiffs, or for any other reason than a mistaken one of a supposed right to make them, and in such cases compensation to the patentee for the damages sustained by him, and not punishment of the defendant, should limit the plaintiff's recovery to the actual damages they have sustained.”

In discussing a plaintiff's claim for allowance of attorneys' fees in a patent case before this discre-



tionary power was granted by statute, the Supreme Court said, in *Day v. Woodworth et al.*, 13 How. 363; 14 L. Ed. 181, that if such a practice were followed

“... the defendant may be truly said to be in misericordia, being at the mercy of both the court and jury.”

The courts have treated this discretionary power as one to be exercised only where the facts warrant punitive damages.

Certainly there is no fact or circumstance either alleged or present in this case to warrant the assessment of any punitive penalty upon plaintiffs. They have merely asserted a right granted them by the Constitution and patent law. Defendant has failed to show either that the patent grants were not valid ones or that the patent claims cannot be fairly and reasonably read upon defendant's devices. On the contrary, plaintiffs' expert has specifically read the claims upon defendant's structures.

It is submitted that a patentee should be entitled to assert his patent grant in good faith without having a punitive penalty [48] imposed upon him. It would jeopardize our industrial advancement if an inventor dared not ask the courts to interpret his patent without risking a punitive penalty which might bankrupt him if the court should interpret the patent to mean something which is does not recite. Such a rule would seriously discourage inventors—and would produce a result just opposite to

that intended by the Constitutional foundation for the patent law.

Wherefore, plaintiff's submit that a new trial and rehearing should be granted and that new findings, conclusions and judgment should be entered holding the patents valid and infringed.

Dated this 28th day of May, 1947.

Respectfully submitted,

MASON & GRAHAM,  
/s/ C. W. MASON,  
Attorneys for Plaintiffs.





Claim 2

A sheet metal clamp, comprising, in combination,

a cylindric body (5),

an end cap (11) mounted on the body in position closing the outer end thereof, said cap presenting an opening (12) therethrough and a work-engaging outer surface,

a plunger (20) reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,

a spreader member having a laterally projecting inner end portion (25) disposed in the cap and an outer end portion (25a) projecting outwardly through said opening in engagement with the work-engaging member,

an inwardly disposed flange (16) on the inner surface of the body adjacent its inner end,

a coil spring (32) in the body around and retractively engaging the plunger and tool-operated means for protracting the plunger against the pressure of said spring comprising a plunger engaging member (17) reciprocally mounted in and projecting from the inner end of the body for manual engagement, said member having a relatively increased diameter inner end portion (33) engageable against said flange when the plunger is in fully retracted position.

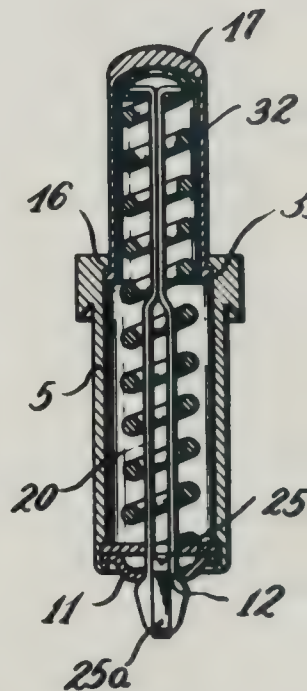
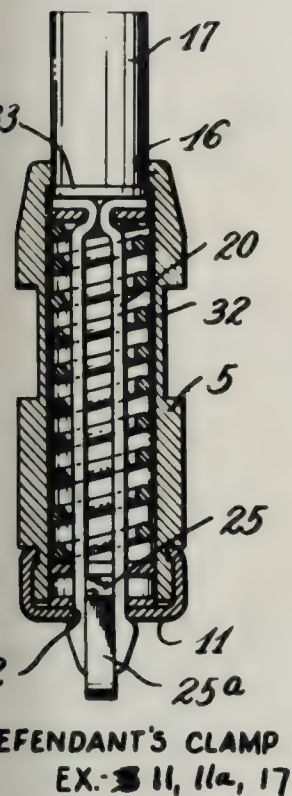


FIG. 1  
PATENT 2364408



At a stated term, to wit: The February Term. A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday, the 25th day of June in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable: J. F. T. O'Connor,  
District Judge.

[Title of Cause.]

Minute Order June 25, 1947

### DENYING MOTION FOR NEW TRIAL

The Court enters ruling on motion for new trial filed by plaintiffs May 29, 1947, as follows:

“Oral arguments having been heard by the Court, and the Court having examined the motion and the authorities, it is ordered that the motion for new trial is denied and exception is allowed plaintiffs.”

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Herman H. Helbush and Monogram Manufacturing Co., a corporation, plaintiffs in the above-entitled action, do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final decree and judgment entered herein on May 20, 1947, in which action an



order was entered on June 25, 1947, denying motion for new trial herein filed by said plaintiffs on May 29, 1947.

Dated this 23rd day of September, 1947.

MASON & GRAHAM,  
/s/ C. W. MASON,  
Attorneys for Plaintiffs.

[Endorsed]: Filed and mailed copy to Lyon & Lyon, Sept. 23, 1947. [53]

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[Title of District Court and Cause.]

BOND ON APPEAL

No. 960981

Whereas, the above named Plaintiffs have commenced an action in the District Court of the United States, Southern District of California, Central Division asking said Court to uphold the validity of certain United States Letters Patent and to find said Letters Patent infringed by the Defendants here, and to grant a perpetual injunction in favor of said Plaintiffs and

Whereas, on June 25, 1947, judgment was entered in said Court in favor of the defendants herein and

Whereas, Herman H. Helbush and Monogram Manufacturing Co., a corporation, Plaintiffs herein, are dissatisfied with said judgment and are desirous of Appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit,

Now, Therefore, in consideration of the premises and of such appeal the undersigned Indemnity In-

insurance Company of North America, a Pennsylvania [54] corporation, does acknowledge itself bound as Surety for said appellants, Herman H. Helbush and Monogram Manufacturing Co., a corporation, in the sum of Two Hundred Fifty and No/100 Dollars (\$250.00) conditioned that said appellants, Herman H. Helbush and Monogram Manufacturing Co., a corporation, will pay all costs awarded against them on the appeal, and it does hereby agree that in event of the default or contumacy of the said appellants execution may issue against the undersigned Surety, its goods, land and chattels, for the amount of said costs not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00.).

Sealed and dated this 22nd day of September, 1947.

INDEMNITY INSURANCE  
COMPANY OF NORTH  
AMERICA,

By /s/ HENRY R. BUCK,

Attorney in Fact.

Examined and recommend for approval as provided in Rule 8.

/s/ C. W. MASON,

Attorney.

I hereby approve the foregoing bond this 23 day of Sept., 1947.

J. F. T. O'CONNOR,  
Judge.

State of California,  
County of Los Angeles—ss.

On this 22nd day of September in the year one thousand nine hundred and forty-seven before me Dorothy Carolyn Hornby, a Notary Public in and for the County of Los Angeles, personally appeared Henry R. Buck, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] /s/ DOROTHY CAROLYN HORNBY,  
Notary Public in and for the county of Los Angeles, State of California.

My Commission Expires Sept. 7, 1951.

[Endorsed]: Filed Sept. 23, 1947.

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[Title of District Court and Cause.]

PLAINTIFFS-APPELLANTS' DESIGNATION  
OF PORTIONS OF RECORD ON APPEAL  
PURSUANT TO RULE 75

The Clerk of this Court, in conformance with Rule 75 of Federal Rules of Civil Procedure, is requested to transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit the following designated portions of the record, proceedings and evi-



dence in this case, certifying those portions thereof necessary to be certified pursuant to said rules or pursuant to the rules of the said Circuit Court of Appeals:

A. The original reporter's transcript of the evidence and proceedings taken at the trial of this case.

B. The following pleadings and documents on file herein:

1. Complaint.
2. Defendants' amended answer to complaint, and counterclaim.
3. Plaintiffs' answer to amended counterclaim.
4. Stipulation dated January 15, 1947, dismissing complaint as to Patent 2,320,493 and dismissing defendants' counterclaim for infringement of Patent 2,393,088.
5. Supplemental complaint.
6. Stipulation dated January 24, 1947, re supplemental complaint and answer thereto.
7. Minute order entered February 18, 1947, holding non-infringement.
8. Defendants' proposed findings of fact and conclusions of law.
9. Findings of fact and conclusions of law as entered.
10. Final judgment.
11. Plaintiffs' motion for new trial filed May 29, 1947.

12. Minute order entered June 25, 1947, denying plaintiffs' motion for new trial.

13. Notice of appeal.

14. Bond on appeal.

15. This designation.

C. The following original plaintiffs' exhibits:

Ex. 1. Patent in suit 2,365,787.

Ex. 2. Patent in suit 2,364,408.

Ex. 3. File history of Patent 2,365,787.

Ex. 3a. Reference Patent 2,248,882.

Ex. 3b. Reference Patent 2,256,243.

Ex. 3c. Reference Patent 2,136,875.

Ex. 4. File history of Patent 2,364,408.

Ex. 5. Clamp device.

Ex. 6. Clamp device.

Ex. 7. Clamp device.

Ex. 8. Plaintiffs' catalog.

Ex. 9. Stipulation dated Jan. 15, 1947.

Ex. 10. Clamp device.

Ex. 11. Clamp device.

Ex. 11a. Clamp device.

Ex. 12. Clamp device.

Ex. 12a. Clamp device.

Ex. 13. Clamp device.

Ex. 14. Test Plate.

Ex. 15. Clamp-operating tool.

Ex. 16. Chart.

Ex. 17. Chart.

Ex. 18. Chart.

Ex. 19. Chart.

- Ex. 20. Chart.
- Ex. 21. Chart.
- Ex. 22. Chart.
- Ex. 23. Reference Patent 2,292,489.
- Ex. 24. Concise statement of points under Rule 75(d).

D. The following original defendants' exhibits:

- Ex. A. Clamp device.
- Ex. B. Clamp device.
- Ex. C. Clamp device.
- Ex. D. Parts of clamp device.
- Ex. E. Clamp device sub-assembly.
- Ex. F. Clamp device sub-assembly.
- Ex. G. Clamp device sub-assembly.
- Ex. H3. British Patent 413,403.
- Ex. H4. British Patent 443,683.
- Ex. H5. United States Patent 2,136,875.
- Ex. H6. United States Patent 2,159,655.
- Ex. H7. United States Patent 2,269,188.
- Ex. H8. United States Patent 2,256,634.
- Ex. H9. United States Patent 2,276,344.
- Ex. H10. United States Patent 2,271,879.
- Ex. H11. United States Patent 2,266,929.
- Ex. I. Chart.
- Ex. J. Chart.
- Ex. K. Chart.
- Ex. L. Chart.



Ex. M. Sketch.

Ex. N. Chart.

Ex. O. Chart.

Dated this 25th day of September, 1947.

MASON & GRAHAM,  
/s/ C. W. MASON,  
Attorneys for Plaintiffs.

Received copy of the within Designation of Portions, this 26th day of September, 1947.

LYON & LYON,  
/s/ FREDERICK W. LYON,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 26, 1947.

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[Title of District Court and Cause.]

STIPULATION FOR USE OF ONE COPY  
OF REPORTER'S TRANSCRIPT

It Is Hereby Stipulated by and between the parties to this action, through their respective attorneys, that one one copy of the reporter's transcript of the evidence and proceedings at the trial of this action shall be filed by appellants herein, which copy shall be available for use by the Circuit Court of Appeals for the 9th Circuit.

This stipulation shall be included as an addition

to plaintiffs appellants' designations of portions of record on appeal pursuant to Rule 75.

Dated this 25th day of September, 1947.

MASON & GRAHAM,  
/s/ C. W. MASON,  
Attorneys for Plaintiffs.  
LYON & LYON,  
/s/ FREDERICK W. LYON,  
Attorneys for Defendant.

It is So Ordered:

/s/ J. F. T. O'CONNOR,  
U. S. District Judge.

[Endorsed]: Filed Oct. 9, 1947.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 66, inclusive, contain full, true and correct copies of Complaint for Infringement of Letters Patents; Amended Answer to Complaint and Counterclaim; Answer to Amended Counterclaim; Dismissal; Stipulation; Supplemental Complaint for Infringement of Letters Patent; Minute Order Entered February 18, 1947; Findings of Fact and Conclusions of Law; Final Judgment; Notice of Motion; Plaintiffs' Motion for New Trial;

Minute Order Entered June 25, 1947; Notice of Appeal; Bond on Appeal; Statement of Points on Appeal; Designation of Record on Appeal; Stipulation and Order re Reporter's Transcript and Stipulation and Order re Original Exhibits, which, together with copy of reporter's transcript of proceedings on January 22, 23 and 24, 1947 and Original Plaintiffs' Exhibits 1, 2, 3, 3a, 3b, 3c, 4-11, 11a, 12, 12a, 13-23 and Original Defendant's Exhibits A-G, H4-H-11, I-O, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$8.70 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 16th day of October, A. D. 1947.

[Seal]

EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy Clerk.



In the District Court of the United States for the  
Southern District of California, Central Division

Civil Action No. 5453-O'C.

HERMAN H. HELBUSH and  
MONOGRAM MANUFACTURING CO.,  
a corporation,  
  
Plaintiffs,  
  
vs.

DONALD H. HINKLE, doing business as  
WEDGELOCK COMPANY,  
  
Defendant.

REPORTERS' TRANSCRIPT  
OF PROCEEDINGS

Honorable J. F. T. O'Connor,  
Judge Presiding

Counsel:

For the Plaintiffs: Mason & Graham, By Collins  
Mason, Esq., 811 West Seventh Street, Los Angeles,  
California.

For the Defendant: Lyon & Lyon, By Frederick  
W. Lyon, 811 West Seventh Street, Los Angeles,  
California. [1\*]

Los Angeles, California, Wednesday, January 22,  
1946, 2:00 P.M.

The Court: Mr. Cross, will you call the calendar?

The Clerk: Yes, your Honor. No. 5453, Herman

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\* Page numbering appearing at top of page of Reporter's certified  
Transcript of Record.

H. Helbush and others, vs. Donald H. Finkle, for court trial.

Mr. Mason: Ready for the plaintiff.

Mr. F. W. Lyon: Ready.

The Court: Proceed.

Mr. F. W. Lyon: Before we proceed, might I suggest that we have a stipulation on the record that daily transcript be furnished and that the court's copy be paid 50 per cent by each party and any copies the parties desire to be paid by themselves; the original transcript to be taxed as costs at the end of the trial.

Mr. Mason: So stipulated.

The Court: The stipulation will be approved.

Mr. Mason: May it please the court: There were originally three patents charged to be infringed by the plaintiff, and there is one patent set up as a counter-claim. Now, we have stipulated for a dismissal as to Patent 2,320,493, originally named in the complaint, and as to the patent charged in the counter-claim 2,393,088. I have the stipulation here, your Honor.

Also, I have here a trial brief with charts attached to it and copies of the patents annexed, which your Honor may [2] wish to follow.

Now, before making an opening statement, I would like to introduce some exhibits and also have some marked for identification, because I would like to refer to some of them in the course of my opening statement, and I think we will keep the record straight in that way.

The Court: That will be satisfactory.

Mr. Mason: First, I will offer the patents in suit.  
As Exhibit No. 1 Patent No. 2,365,787.

The Clerk: Plaintiffs' Exhibit No. 1.

The Court: 2,365,787?

Mr. Mason: '787. I will refer to that throughout the trial as Patent '787, for brevity.

Mr. F. W. Lyon: May I make a suggestion? We might as well have them put in evidence, unless I have some objection to them.

Mr. Mason: I am offering them in evidence.

Mr. F. W. Lyon: All of these exhibits, because it will save time.

The Court: Now, I am not sure of the number.

The Clerk: The first was No. 1, your Honor.

Mr. Mason: As exhibit next in order I offer No. 2,364,408.

The Clerk: That is Plaintiffs' Exhibit No. 2.

The Court: 2,364,408? [3]

Mr. Mason: 2,364,408. Here are a couple of extra copies of each patent, your Honor, for your use.

The Court: That is Exhibit No. 2, Mr. Cross?

The Clerk: Yes, your Honor.

Mr. Mason: Now, I will offer in evidence the file history of Patent No. 2,365,787.

Mr. F. W. Lyon: The file wrapper, you mean?

Mr. Mason: The file wrapper.

The Court: As Exhibit No. 3?

The Clerk: Plaintiffs' Exhibit No. 3.

The Court: That is the file wrapper. What is the number?

The Clerk: The number, your Honor, is 2,365,-787.



Mr. Mason: Now, practically all the reference cited against the application during its prosecution before the Patent Office have been set up in the defendant's answer as to prior art, and I assume that the defendant will offer those in evidence in the course of the case. So as to avoid duplication I will only offer three patents which were cited and not named in the answer as being the prior art cited against the Patent '787. The first will be the Lear patent, 2,248,882.

The Court: I cannot possibly get those down as fast as you read them, counsel.

Mr. Mason: 2,248,882. That was a patent cited as a reference against Patent '787. I would like to have that [4] marked Exhibit 3-A.

The Clerk: Plaintiffs' Exhibit 3-A.

Mr. Mason: The next one of those patents will be the Edwards patent, 2,256,243, as Exhibit 3-B.

The Clerk: Plaintiffs' Exhibit 3-B.

The Court: That is called what? What patent?

Mr. Mason: Edwards.

The Court: E-d-w-a-r-d-s?

Mr. Mason: Yes, your Honor. The third one of those is 2,136,875.

The Court: 2,136,875.

Mr. Mason: Issued to Blanc, B-l-a-n-c, as Exhibit 3-C.

The Clerk: Plaintiffs' Exhibit 3-C. [5]

I now offer the file wrapper of patent 2,364,408.

The Court: 2,364,408.

Mr. Mason: The references cited against that are set up in the answer.

The Clerk: That will be Plaintiffs' Exhibit 4.

Mr. Mason: Next, I would like to offer for identification one of the Plaintiffs' clamp devices as Exhibit 5.

The Clerk: Plaintiffs' Exhibit No. 5 for identification.

Mr. F. W. Lyon: Plaintiffs'?

Mr. Mason: Plaintiffs', yes.

The Court: Is there some question about it? I notice counsel offers it for identification.

Mr. Mason: Unless counsel approves it.

Mr. F. W. Lyon: I think I can just take a look at it. I am sure that I can, your Honor.

The Court: That is fine. It saves time.

Mr. F. W. Lyon: I just want to see which one is which. Yes; there is no objection to these.

Mr. Mason: I will offer them in evidence, your Honor.

The Court: All right.

The Clerk: 5 in evidence.

Mr. Mason: And, as Exhibit 6, I will offer another one of plaintiffs' clamps.

The Clerk: Plaintiffs' Exhibit No. 6 in evidence.

Mr. Mason: And, as Exhibit 7, another one of plaintiffs' clamps. [6]

The Clerk: Plaintiffs' Exhibit No. 7 in evidence.

Mr. Mason: And, as Plaintiffs' Exhibit 8, one of plaintiffs' catalogs.

Mr. F. W. Lyon: The only objection to this that I have is as to its materiality. It states right on it it was printed long after these patents were issued, your Honor, in 1944.

Mr. Mason: Suppose we have it marked for identification. It is merely to assist the court in examining the subject matter.

The Clerk: No. 8 for identification.

Mr. Mason: Now I would like to offer a stipulation of facts entered into by the parties as to title, and as to certain dates of invention, and as to notice, and as to manufacture of the clamps by the defendant which we charge to infringe.

The first one of these is Exhibit 9, which, however, is not charged to be an infringement.

The Court: No; 10. The stipulation is 9.

The Clerk: Do you wish that as No. 9, your Honor?

The Court: Yes. Here it is, Mr. Cross.

The Clerk: Yes, your Honor. The stipulation is Plaintiffs' Exhibit No. 9, and this clamp will be Plaintiffs' Exhibit 10 in evidence. [7]

The Court: Who manufactured the clamp?

Mr. Mason: That is the defendant's clamp, your Honor. That, however, is not charged to be an infringement.

As the next exhibit, 11, will be one of the defendant's clamps which is referred to in the stipulation as "stipulation exhibit B".

The Clerk: That will be Plaintiffs' Exhibit No. 11 in evidence.

Mr. Mason: And, as 11-A, I would like to offer a specimen of the same clamp, defendant's, but cut open so that the inside may be inspected.

The Clerk: 11-A in evidence.



Mr. Mason: And, as the next exhibit, one of the defendant's clamps, which is "stipulation exhibit C".

The Clerk: That will be Plaintiffs' Exhibit No. 12 in evidence.

The Court: Now, wait. Counsel stated "C". It has either got to be "11-C" or——

Mr. Mason: No. That was stipulation exhibit C, your Honor, referred to in the stipulation of facts.

The Court: Now, wait. It is 12, then, Mr. Cross?

The Clerk: Yes, your Honor.

The Court: What is this instrument?

Mr. Mason: That is one of the defendant's clamps which is charged as an infringement. 11, also, is charged to infringe. [8]

And, as 12-A, I will offer the same clamp as Exhibit 12, except that it is cut in half so that the inside may be inspected, and a lighter spring has been substituted in lieu of a heavier spring so it will not tend to fly out.

Mr. F. W. Lyon: We will stipulate that that is our clamp of defendant's manufacture, but that a light spring, and not the spring that would be used, has been placed in there.

The Clerk: That will be Plaintiffs' Exhibit 12-A.

Mr. Mason: And I will state that Exhibits 11 and 12 and, of course, 11-A and 12-A, which are the same, are the only ones charged to constitute infringement of the patents in suit; and both of those exhibits, 11 and 12, we charge to infringe patent '787, but Exhibit 12 we charge only to infringe patent '408.

Now I would like to offer for identification—I will offer it in evidence—a specimen of a type of clamp known as “Cleco” clamp to which reference will be made during the case.

The Court: How do you spell it?

Mr. Mason: C-l-e-c-o.

The Clerk: Plaintiffs’ Exhibit 13 in evidence.

Mr. Mason: As the next exhibit, I will offer a test plate for use in demonstrating these clamp devices. [9]

The Clerk: Plaintiffs’ Exhibit 14 in evidence.

The Court: Will you repeat what counsel just said there?

(Record read by the reporter.)

Mr. Mason: And, as the next exhibit, I would like to offer a clamp-operating tool or gun which is used to operate these clamp devices.

The Clerk: Plaintiffs’ Exhibit 15 in evidence.

Mr. Mason: I would like to offer in evidence plaintiffs’ interrogatories 1 to 4, inclusive; 7 to 7-J, inclusive; 7-AA to 7-JJ, inclusive; 7-BBB to 7-JJJ, inclusive; 8 to 13, inclusive; 17 to 22, inclusive; 26 to 31, inclusive; and 35 to 40, inclusive; as well as the defendant’s answers to those interrogatories.

\* \* \* \* \*

The Court: All right.

Mr. Mason: I will call Mr. Livingston.

E. R. LIVINGSTON

called as a witness by and on behalf of the plaintiffs,  
having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: E. R. Livingston.

The Court: Spell it.

The Witness: L-i-v-i-n-g-s-t-o-n.

Direct Examination

By Mr. Mason:

Q. What is your business Mr. Livingston?

A. I am an officer of the Monogram Manufacturing Company.

Q. What officer?

A. Vice-president.

Q. Is that one of the plaintiffs in this case?

A. Yes.

Q. Now, what is the business of the Monogram Manufacturing Company?

A. Well, the Monogram Manufacturing Company is engaged in the manufacture of sheet metal fasteners; also, plastic items for five-and-ten-cent store distribution and other tools and equipment for both aircraft and automobile industry. [18]

Q. Now, how long has it been so engaged?

A. Since 1938.

Q. You have mentioned that a part of this business is the manufacture of the sheet metal clamps.



(Testimony of E. R. Livingston.)

I show you Plaintiffs' Exhibits 5, 6, and 7, and ask you if those are specimens of the plaintiffs' product.

A. Yes, all three of these clamps are manufactured by the Monogram Manufacturing Company.

Q. Are they manufactured under these patents in suit?

Mr. F. W. Lyon: I object to that, your Honor, as a conclusion of the witness: Are those made under the patent in suit?

The Court: Yes. The testimony will show whether they are or not.

Mr. Mason: I withdraw the question.

Q. (By Mr. Mason): Now, when did the Monogram Manufacturing Company commence the manufacture of the clamps evidenced by Exhibit 5?

A. In March, of 1941.

Q. Were the other exhibits manufactured subsequent to that time?

A. At later dates, yes.

The Court: That is Exhibits 6 and 7?

The Witness: 6 and 7, yes. [19]

Q. (By Mr. Mason): So that the court may have a clear understanding of what these clamps are and what they are used for, will you explain generally what are the various uses for sheet metal clamps?

A. Well, one of the principal uses is in the aircraft industry, where complete fuselage and wings, the sheet metal, the covering over those wings is assembled in place completely with these clamps

(Testimony of E. R. Livingston.)

prior to the placing of rivets. A clamp of this nature is placed in about every fourth or fifth rivet hole, so that thousands of these clamps are used in the complete assembly of the particular part of the plane that is being prepared for the riveting operation.

The Court: Now, you referred to clamps. Which exhibit is that, the clamp itself?

The Witness: Well, either of these Exhibits 5, 6 or 7; clamps of that general nature.

The Court: Let me see them, please.

(The exhibits were handed to the court.)

Q. (By Mr. Mason): I hand you the catalog, Exhibit No. 8, and ask if there is any illustration of the use of clamps in that catalog?

A. I haven't finished with that other answer, if you want me to.

In addition to the use in aircraft, they are also used by the automobile industry in the fabrication of bodies; and [20] in refrigeration plants and in the manufacture of Pullman cars or buses, trailers, in fact, any industry where sheet metal is attached to a structural member and held together prior to a riveting operation. So it covers a great many industries.

Q. Now, I show you the catalog, Exhibit No. 8, and ask you if that contains any illustrations of the use of clamps of this kind.

A. Yes, it does.

Q. You are referring to the illustration on Page 3?

(Testimony of E. R. Livingston.)

A. Page 3 shows a picture of a wing assembly with the clamps inserted in the rivet holes prior to the riveting operation. That picture, by the way, was taken out at the Douglas Aircraft plant of an actual ship under production.

The Court: May I see it?

(The document referred to was handed to the court.)

The Court: What portion of Exhibits 5, 6 or 7 is left in the plate, in the covering?

The Witness: What you see in the picture there, your Honor, is the entire clamp, that is, the two pinheads and the spreader are locked on the other side of the sheet.

The Court: Yes, I understand that.

The Witness: This stays in the drilled hole prior to riveting. Then as the rivets are put in, these are withdrawn and replaced by solid riveting. [21]

The Court: That is what I wanted to get clear.

The Witness: The entire assembly is put together with these clamps without rivets. Then they get ready for the riveting operation, and as they proceed from one row to another, there is one man who pulls the clamps out, and they are replaced permanently by the rivets.

The Court: What is the purpose of inserting these first? To keep the form correct?

The Witness: To prepare the work for riveting, to completely stretch the sheet metal skin. It is aluminum sheet. Of course, it is a big piece of alumi-



(Testimony of E. R. Livingston.)

num sheet, which is very awkward to handle, and it holds the whole thing in place in a solid position prior to the riveting operation.

The Court: Yes, I understand.

The Witness: And it holds it down tightly to the rib structure underneath the sheet.

The Court: I see.

The Witness: There are thousands of rivet holes in each one of these sheets.

Q. (By Mr. Mason): Does that clamp also hold the rivet holes in alignment?

A. That is correct, and minimizes—the more clamps they put in, it minimizes the shifting of the sheet over the frame and holds it in perfect registration. That is why they put them in every fourth or fifth rivet hole, to minimize the [22] shift of the sheet, so that the aluminum sheet metal is held in registration. And they also perform additional drilling operations after the sheet is in place, prior to riveting.

Mr. F. W. Lyon: You could sum it up by stating that these clamps act like a basting thread in the making of clothes, that it holds the thing in a vise while you are putting the permanent stitches in it?

The Witness: That is right.

The Court: And these clamps are then removed for further use?

The Witness: For further use, yes.

The Court: All right.

Q. (By Mr. Mason): Now, you are familiar with the type of sheet metal clamp that was in use

(Testimony of E. R. Livingston.)

prior to the time that the Monogram Manufacturing Company brought out this clamp, Exhibit 5?

A. Yes. The clamp that was in universal use at that time, which was in March of 1941, was manufactured by the Cleveland Tool Company, and was called the Cleco clamp, which was a trade name of the Cleveland Tool Company. A clamp of this same general type was also being manufactured by the F. & H. Manufacturing Company.

Q. I show you Exhibit 13 and ask you if that is the clamp to which you have referred.

A. Yes, this is the old type. [23]

The Court: Exhibit what?

Mr. Mason: Exhibit 13.

The Witness: Exhibit 13.

The Court: All right.

The Witness: This is the old type of Cleco clamp that was on the market at that time.

Q. (By Mr. Mason): Now, will you describe that clamp and explain how it is used?

A. Well, this clamp comprises an outer body, and I call it a pin, a stationary pin, which projects outwardly from the face of the body. Assembled in that body is a locking pin member, which is actuated by a spring, which protracts and retracts this locking pin through the drilled hole in the sheet. In order to apply this clamp, this large head of the locking pin has to be first angled into the hole, slid over to the right to accommodate the entering of the stationary pin which projects outwardly from the body, to also go into the drilled hole, and when

(Testimony of E. R. Livingston.)

in that position the spring is released and the locking pin with this expanded head here comes back and locks; increases its diameter, you might say, on the opposite side of the drilled hole, and it is locked so that it can't pull through, and it holds the sheet in place in proportion to the spring pressure that is applied. That is a very difficult clamp to apply. It also produces a one-sided clamping action on one side of the hole, and that clamping [24] action is not evenly distributed or shared on either side of the drilled hole.

Q. Now, are there any differences in the application and use of that clamp, as compared with the Monogram clamp in Exhibits 5, 6 or 7?

A. Well, the fundamental difference of the Monogram clamp is two clamping pins are used, which provides a two-sided clamping pressure on the skins being held in place, and it also can be inserted and withdrawn on a horizontal straight line with ease. These two clamping pins are protracted and retracted by the spring. As these two heads——

The Court: Just a moment. Now, when you go from one clamp to the other, you will have to show in the record the exhibit number, so that it will not be confusing. Will you strike out that answer and repeat the question of counsel?

(The question referred to was read by the reporter as follows:

“Now, are there any differences in the application and use of that clamp”——)



(Testimony of E. R. Livingston.)

The Court: Now, that clamp is Exhibit No. 13?

The Witness: Exhibit 13.

The Court: Proceed from there.

The Witness: Well, the principal differences between the clamp, Cleco clamp shown in Exhibit 13, and the Monogram clamp in Exhibit 6 is that whereas the Cleco clamp in Exhibit 13 [25] uses a single contracting pin, Exhibit 6, the Monogram clamp uses two contracting pins. These two clamping pins of the Monogram clamp are protracted and retracted by a spring, and they move relative to a fixed spreader between the two clamping pins. As these two clamping pins are protracted, the heads of the pins extend beyond the end of the fixed spread, reducing the diameter to a diameter less than the drilled hole into which they are to be inserted. When the spring retracts, the pins are spread apart by the fixed spreader. The total thickness of the diameter of the two heads of the pins, plus the thickness of the spreader, creates a diameter which is greater than the drilled hole on the opposite side of the drilled hole, so that it comes back and locks securely, and applies a clamping pressure on both sides of the drilled hole, as compared with one side of the drilled hole, as shown by the Cleco clamp in Exhibit 13.

This Monogram clamp in Exhibit 6 is very easy to insert and withdraw from the drilled hole, as it is inserted in a completely horizontal motion, and it does not have to be angled to let the needle heads, the clamping pin heads, go through the drilled hole.

(Testimony of E. R. Livingston.)

The Court: To penetrate the drilled hole?

The Witness: That is right. It is pushed right in like threading a needle. It is pushed straight in instead of having to be angled in. [26]

Q. (By Mr. Mason): I notice that in Exhibit 6 the spring was not exposed, but in Exhibit 13 the spring is exposed. What difference does that make, if any?

A. That is a very important difference between the Cleco clamp in Exhibit 13 and the Monogram clamp in Exhibit 6. The Cleco clamp in Exhibit 13 provides no means for securely holding the spring, and the clamping needles inside the body, in the event that any one of those component parts should break and by the force of the spring pressure project those component parts through the air and possibly endanger the workmen. During the war there were a great many accidents like that occurring, of workmen losing their eyes in aircraft plants, where in walking along the panel of the wing assembly, all of a sudden a clamp would come flying through the air with about 165 pounds of spring pressure behind it and hit the persons and put their eyes out.

The Monogram clamp in Exhibit No. 6 provides a means of locking these component parts which are actuated by the spring pressure inside the body of the clamp. A plunger is provided, which has a shoulder which goes in the body of the clamp, and the rear body of the clamp, with a flange in the back, is crimped over the shoulder, so the plunger cannot possibly come back. So if the needle heads here

(Testimony of E. R. Livingston.)

through wear, or breakage in usage, would break, this clamp would merely drop out of the hole and the spring pressure would not project those [27] component parts through the air.

Q. Now, will you refer to Exhibit No. 7 and point out the differences?

A. Exhibit No. 7 is a class of clamp similar to Exhibit No. 6, the main difference being that this retaining plunger which I spoke of is also encased entirely inside the body of the clamp and does not project, so that all the component parts of the clamp are completely housed in the body, and the rear of the body is clamped over, sealing them all in in a solid, you might say, a solid cylinder.

Q. How do you project those clamping pins from the body? Do you use a tool for that purpose?

A. Oh, yes. The clamp is operated with a clamp-applying tool.

Q. Are you referring to a device like Exhibit No. 15?

A. Yes, that is what is known as the Monogram universal gun for applying clamps of this general nature.

Q. Now, will you take Exhibit No. 15 and insert in that gun Exhibit 7, and demonstrate to the court what you are doing, and explain it as you go along for the record.

A. I am holding Exhibit 7 in my left hand and dropping that into the receiving channel of Exhibit 15.



(Testimony of E. R. Livingston.)

The Court: I believe that is the first mention we have had of Exhibit 15 in your testimony.

The Witness: 15 is the gun. [28]

The Court: All right.

The Witness: The gun is so designed that when the clamp is slipped in there, and the tool is operated, that the clamp cannot come out.

Q. (By Mr. Mason): Will you explain how that happens?

A. Well, the front diameter of the clamp itself is less than the rear diameter of the clamp body. This difference in diameters permits the clamp to go under raised ears in the clamp-applying tool, so that when that is slipped under there, the clamp has no possible chance of coming out while the tool is being operated. They can't possibly come out, you see. It is locked in place, in other words, before the tool is operated, and cannot fly out of the gun.

Q. As I understand it, as you pull the trigger on that gun, that causes the plunger to enter the body of the clamp and project the clamp?

A. And project the pins and compress the spring.

Q. When you release the pressure applied by the gun, what happens?

A. The clamping pins retract.

Q. I believe in your testimony a little while ago you stated the spring was used to protract the pin. You mean they are manually protracted by pressing the spring?

A. That's right.

(Testimony of E. R. Livingston.)

Mr. F. W. Lyon: Your Honor, I don't know about this gun, [29] and I believe statements should be made that there is nothing in the suit which refers to the gun, that it is just an applying tool to project the clamps.

Mr. Mason: That is correct, your Honor. They are merely referred to to demonstrate how the clamps are used.

Mr. F. W. Lyon: The gun has nothing to do with the patents in suit.

Mr. Mason: That is correct.

Q. (By Mr. Mason): At the time that Monogram commenced manufacturing this clamp, Exhibit 5, to your knowledge——

The Court: Now, let me get this clear, in view of Mr. Lyon's statement. This witness has gone into some detail in showing the fitting in of this Exhibit 5, 6 and 7, or an instrument similar, into this particular gun which is marked Exhibit 15, to show that there is no possibility of flying out because of the fact that the construction of the gun prohibited the clamp from coming out. That has nothing to do with the suit, then, is that correct?

Mr. Mason: Yes, your Honor. He merely brought that in incidentally to explain the use of it. That happens to be a feature, a patented feature of this gun, that is not involved in this case at all.

The Court: Yes. I asked that because of the emphasis both in your opening statement and that this witness made, to the fact that so many people were injured. [30]

(Testimony of E. R. Livingston.)

Mr. Mason: That was one element which is not involved in this case. The only element of injuries which we are referring to is after the clamps are in.

The Court: After they are inserted in place, then the contention of the witness and yours——

Mr. Mason: That is right.

The Court: ——is that they are less liable to spring out and strike a person?

Mr. Mason: That is right.

Mr. F. W. Lyon: It is not while they are in the gun that we are interested in.

The Court: No. I have that clear.

Q. (By Mr. Mason): At the time that Monogram Manufacturing Company commenced manufacturing these clamps, as exemplified by Exhibit 5, to your knowledge, was there any other clamp on the market in which a pair of clamping pins were projected from the body relative to a spreader bar, which had one of its legs extending outwardly from the body between those pins?

A. There was no clamp——

Mr. F. W. Lyon: That is objected to, your Honor, as no foundation laid. He hasn't stated what that time is that his knowledge refers to.

Mr. Mason: He stated when he commenced manufacturing.

The Court: That was in March, 1941, when he started to [31] manufacture.

Mr. F. W. Lyon: All right. I just want the date.

The Court: Yes.



(Testimony of E. R. Livingston.)

Q. (By Mr. Mason): Did you answer that question?

A. No, I haven't. No, there was no clamp of that type being manufactured in March of 1941.

Q. Are you familiar with the clamp device manufactured by the defendant in this case?

A. Yes, generally.

Q. I show you Plaintiffs' Exhibit 10, which has been——

The Court: Before you go into that, Mr. Mason, while I understand Mr. Lyon says that the catalog was printed some time after all of this——

Mr. F. W. Lyon: That shows right on it, your Honor.

The Court: ——I wondered this: On Page 5 of the catalog introduced or marked for identification, there is a sketch here of these clamps. I would like to ask the witness if they are the same clamps that are in evidence here as Exhibits 5, 6 and 7. You can all look at this, counsel.

Mr. F. W. Lyon: Now, where is Exhibit 5?

The Witness: This one here.

The Court: There are three in different positions.

The Witness: This is exactly the same clamp, your Honor, with the exception of the rear assembly of the pins in Exhibit 5. Here we use a solid bushing, whereas a different [32] type of assembly is used to hold the pins in the back. But the two pins and the fixed spreader and the cap are identical with Exhibit 5. [33]

(Testimony of E. R. Livingston.)

The Court: Now, let me get it clear. Looking at page 5 of Exhibit 8 for identification, and looking at the black background A is the start of the penetration, is it not?

The Witness: That is correct.

The Court: And the spring seems to be compressed there?

The Witness: Yes.

The Court: And in B, it shows a further penetration of it—what do you call these two?

The Witness: Locking pins.

The Court: Of the locking pins?

The Witness: Which shows the spring release, your Honor.

The Court: That is what I am getting at.

The Witness: With the locking pins' heads locked against the other side.

The Court: What does C do to it?

The Witness: This illustrates the assembly of the needles inside the body of the clamp.

Mr. F. W. Lyon: You mean what you call the locking pins, don't you?

The Witness: Yes.

The Court: Oh, yes. They have nothing to do with the final operation?

The Witness: No. This is a sub-assembly that goes in to make up this assembly. [34]

The Court: Yes. That is what I wanted to get clear.

Mr. Mason: The spreader is not shown in C.

The Witness: If your Honor will note, the

(Testimony of E. R. Livingston.)

spreaders here have a slight toe-in which lets these heads come together when they have penetrated the work.

The Court: And then open?

The Witness: And when they come back, the spreader between them opens them out.

The Court: And catches on the inner wall?

The Witness: And catches on the other side of the work.

The Court: Yes.

Q. (By Mr. Mason): I show you Exhibit 10, which is one of the defendant's clamps, and ask you if you recognize that?

A. Yes; I do.

Q. I will ask you to refer to plaintiffs' clamp Exhibit 5, and point out there again what differences there are that are visible to you.

Mr. F. W. Lyon: Your Honor, I object to this as immaterial. What the plaintiff manufactured, in comparison with what the defendant manufactured, has no relation to what the patent describes. There is no foundation for this line of testimony, that either of these devices are anywhere near the patent in suit. He is describing this purely problematically in so far as the court is concerned. [35]

Mr. Mason: Your Honor, that clamp, Exhibit 10, is not charged to infringe. My purpose in asking the question——

Mr. F. W. Lyon: Only that——

The Court: Now, wait until he finishes.

Mr. F. W. Lyon: Pardon me.



(Testimony of E. R. Livingston.)

Mr. Mason: My purpose in asking the question was to bring out any of the differences to which the patent relates over that clamp which does not infringe. Of course, I am going to do that by the expert, and I merely wanted the court to have full understanding of it as early in the case as I could.

The Court: With that statement, counsel, I cannot see any prejudice. All right.

A. Well, the difference between plaintiffs' Exhibit 5 and Defendant's Exhibit 10—let me change this. The similarity of these two exhibits is that they both have the locking pins and the fixed spreader. However, Plaintiffs' Exhibit 5 has a cap construction on the end of the body; whereas, the front of the body on Exhibit 10 is solid, with no cap construction. The rear of the clamp in Exhibit 10, the two locking pins, are held in a retaining bushing of some type by a wedge, and in Exhibit, Plaintiffs' Exhibit 5, this wedge construction is not used.

Q. (By Mr. Mason): How is the spreader mounted in Exhibit 10 and how is it mounted in Exhibit 5? [36]

A. Well, the Exhibit 10, the spreader is mounted with the "T" part of the spreader inside the outer face of the body, the solid body; whereas, in Exhibit 5, the "T" part of the spreader is between the face of the body and the cap which holds the spreader in place.

Q. Does that make any difference in the manufacture of those devices?

(Testimony of E. R. Livingston.)

A. Yes. The clamp shown by Exhibit A is a very cheap and economical clamp to assemble.

Q. You mean Exhibit 5?

A. Exhibit 5, yes; whereas, the clamp in Exhibit 10 is must more costly to assemble.

Q. Why is that?

Mr. F. W. Lyon: I object to this testimony, as the witness is not qualified as an expert machinist or anything else, nor that he knows the cost of the defendant's manufacture or anything else. He is merely stating that it is cheaper.

The Court: There is no foundation laid, if counsel makes that objection.

Q. (By Mr. Mason): Mr. Livingston, what are your duties with the Monogram Company?

A. I am the vice-president and general manager of the company.

Q. In that work do you have any direct supervision [37] over the manufacture of these clamps?

A. Yes; I do.

Q. Do you have occasion to watch their assembly?

A. Yes; I do.

Q. Have you ever done any of the assembly work yourself?

A. Yes; I have.

Q. Then you know how they are assembled?

A. That is correct.

Q. I will ask you if the Monogram Company has ever made any clamps of the type of Exhibit 10 wherein there is no separate cap on the end of the body, but merely an integral end wall on the body

(Testimony of E. R. Livingston.)

and in which the spreader bar is mounted inside the body and projected outwardly through the hole in the end wall between the pins?

A. Yes; we have made a clamp of that type.

Q. Will you explain your statement that there are differences in the cost of manufacturing Exhibit 5 and the cost of manufacturing the clamp of the type of Exhibit 10?

Mr. F. W. Lyon: I object to that, your Honor. He has stated that he has never been in the manufacture of the type like 10. How can he know the cost of it?

The Witness: I said we did.

The Court: He did make them.

Mr. F. W. Lyon: He only made the one with the cap, he said. [38]

Mr. Mason: I want the record read. He did say that, however.

The Witness: I have made both types.

Mr. F. W. Lyon: Well, if he testified he made both types, I withdraw the objection.

The Court: Yes. Proceed.

The Witness: Will you repeat your question, Mr. Mason?

Mr. Mason: Will you read the question?

(Question read by the reporter.)

A. Well, our actual experience in the assembly of the two types of clamps shown in Exhibit 5 and Exhibit 10 is that the clamp similar to the type in Exhibit 10 takes three times as long to assemble as



(Testimony of E. R. Livingston.)

the clamp in Exhibit 5. The construction of the clamp shown in Exhibit 10 is such that the two needles, the two clamping pins, can be all projected through the hole in the front body of the clamp so that they project outwardly from the body of the clamp. The T spreader is then merely inserted between those two clamping pins, the cap slipped over the top, and the spring is released and pulls that cap back tight to the end of the body which is then crimped and holds the complete assembly in place.

In the clamp shown in Exhibit 10 the spreader has to be held between the two needles or clamping pins, with one clamping pin longer than the other, so that both heads of the clamping pins can be slipped through the body of the clamp, [39] and then the spreader slipped through the hole after those heads have gone through, which is a very tedious and painstaking operation.

Q. As I understand your statement, then, in assembling the clamp of Exhibit 10 you have to insert the spreader from the inside of the clamp; whereas, in Exhibit 5 you merely insert the spreader after the pins have been applied and made the opposite end of the body?

A. That is correct.

Q. After which you apply the cap?

A. That is correct.

Q. Now, do you, if you know and do not mind stating it—or can you state approximately how many of these skin clamps have been manufactured

(Testimony of E. R. Livingston.)

and sold by Monogram Manufacturing Company since March, 1941?

A. We have made over 50 million.

Mr. F. W. Lyon: Objected to as immaterial, your Honor. There is no tie-up of any of these clamps related to the facts in suit; no foundation.

The Court: Well, that can only be developed. At this time I do not suppose we could determine that, could we, counsel, until we hear the evidence as to whether or not these specifications are such as these were manufactured under?

Mr. F. W. Lyon: I have no objection to him testifying [40] to how many of these particular devices were sold.

The Court: Yes.

Mr. F. W. Lyon: But there is no tie-up to the suit.

The Court: Yes; all right.

A. We have manufactured and sold over 50,000,000.

Q. (By Mr. Mason): Now, when you say you have manufactured and sold over 50,00,000 do you mean of the clamps as exemplified by Exhibits 5, 6, and 7? A. Yes.

Q. Does that 50,000,000 also include other clamps?

A. But they had practically the same construction as this type of clamp.

Q. That is, you are referring to Exhibit 5?

The Court: 5, 6, and 7.

A. 5, 6, and 7.

(Testimony of E. R. Livingston.)

Mr. Mason: Yes.

Q. At what price does Monogram sell these clamps?

A. From six to eight cents.

Q. From six to eight cents each?

A. To eight cents; yes, sir.

Q. Do you know whether or not this Cleco type of clamp, Exhibit 13, is still being sold?

A. No. Since this new type of Monogram clamp was put on the market, the Cleco type clamp became obsolete and we never see them any more. [41]

Mr. Mason: That is all.

#### Cross-Examination

By Mr. F. W. Lyon:

Q. Mr. Livingston, you testified that you first manufactured devices similar to Exhibit 5 in March of 1941?

A. We started to manufacture in March of 1941.

Q. When did you first sell clamps exemplified by Exhibit 5?

A. Just shortly thereafter.

Q. A month or so?

A. About a month; yes.

Q. Were you familiar with any other type of clamp on the market prior to that time than the Cleco Exhibit 13?

A. The two clamps I knew of was the Cleco, Exhibit 13, and a similar type of clamp made by the F. & H. Manufacturing Company.



(Testimony of E. R. Livingston.)

Q. Have you any exhibits of that last mentioned clamp?

A. Not in front of me; no.

Q. I will show you a clamp——

The Court: Mark it, will you, please, first?

Mr. F. W. Lyon: Yes; Defendant's Exhibit A.

The Clerk: That will be Defendant's Exhibit A for identification.

Q. (By Mr. F. W. Lyon): ——and ask you if that is the [42] type of clamp you referred to?

A. Well, the exact model of clamp that I recall had a twisted curved member that came out here.

Q. In other words, the movable wire—this is the movable wire sticking out here? A. Yes.

Q. ——curved the other direction in the ones you knew of?

A. Directly away from this fixed pin.

Q. And that is the only clamp you were familiar with?

A. That was in March of 1941, that is all.

Mr. F. W. Lyon: But that one. I will ask the clerk to mark this Exhibit B.

The Clerk: This will be Defendant's Exhibit B for identification.

Q. (By Mr. F. W. Lyon): I show you Defendant's Exhibit B; is that the clamp you referred to as being the other one besides the Cleco?

A. Yes; it was similar to this type of clamp.

Mr. F. W. Lyon: I offer that in evidence as Defendant's Exhibit B.

The Court: : Admitted:

(Testimony of E. R. Livingston.)

The Clerk: Defendant's Exhibit B admitted into evidence.

Q. (By Mr. F. W. Lyon): Were you familiar with a clamp which had the pins, pair of pins, [43] with projections on them similar to Exhibit 5, which had a bar spreader inside of the body, prior to March, 1941? A. No.

Q. You testified that the Monogram Manufacturing Company produced a clamp with a solid body, that is without the end cup on the end of it. Have you any samples of that device?

A. I don't know?

The Court: What is that, Mr. Mason?

Mr. F. W. Lyon: I will ask that that be introduced into evidence as Defendant's next number.

The Court: C.

Mr. F. W. Lyon: C.

The Court: Exhibit C, what was it Mr. Mason?

Mr. Mason: That is a clamp made by Monogram without the end cap similar to Exhibit 10.

Q. (By Mr. F. W. Lyon): Did Monogram Manufacturing Company make any quantity of this type and sell the same?

A. Not a large quantity; no.

Q. What do you mean by "a large quantity"?

A. Could I see it?

Q. That is Exhibit C.

A. Well, originally we made up sleeves on this solid type of sleeve here that was being used experimentally for a different type of clamp. Our particular problem at the time [44] that this clamp here

(Testimony of E. R. Livingston.)

was made was making a clamp of a greater material capacity than 3/16ths. This clamp, Exhibit C, is for a 5/16ths material capacity. And we were requested by the Brewster Company in the east to develop a clamp for 5/16th up to half-inch where the spreader would not project so far out in front of the body of the clamp, for the danger it would be broken off very easily in the operation. And we experimented with a moving spreader at that time, which theoretically could be worked out so that the spreader moved with the moving action of the needles and adjusted itself to the thickness of the material. That did not prove successful and we had a considerable number of these sleeves here on hand, and we utilized these solid sleeves for the manufacture of the type of clamp disclosed in Exhibit C until those sleeves were disposed of. Then we went back to a manufacture of our heavy-duty clamps or for 5/16ths material, using what I will say is the conventional type of spreader and cap assembly, because these clamps here cost us so much to assemble. They were taking three times to assemble this type of clamp as compared to our conventional type of cap and spreader assembly.

Q. Approximately how many of the type of Exhibit C did you make?

A. I couldn't tell you that exactly.

Q. The type similar to Exhibit 5 you made by the millions? [45]

A. That is right.

Q. Did you make a thousand of Exhibit C?



(Testimony of E. R. Livingston.)

A. Oh, we probably made more than a thousand.

Q. Well, approximately? Could you approximate in any way somewhere between a million and zero?

A. I couldn't tell you within—well, it would just be a wild guess on how many we made of that particular type. What I know is we had all kinds of trouble in there for several weeks, before we decided to change back to the old type of assembly.

Q. At the same time, you were making the other type? A. That is right.

Q. Of Exhibit 5?

A. That is right. We had too much trouble with them so we changed it over.

Q. Then you have never developed the jigs and dies, etc., necessarily to properly assemble Exhibit C?

Mr. Mason: I object to that as calling for a conclusion as to what would be the proper method of assembly.

The Court: If the witness can give any statement on it, I will hear it. Repeat the question so the witness understands it.

(Question read by the reporter.)

A. I don't know what counsel means by an assembly die. [46]

Mr. F. W. Lyon: Or jigs, then, put it.

A. Yes; we had this set up on our assembly line with the proper jigs necessary to assemble it.

Q. Will you describe those jigs?

(Testimony of E. R. Livingston.)

The Court: Is that material, Mr. Lyon, as long as we have the product here?

Mr. F. W. Lyon: Yes, your Honor.

The Court: There must have been a jig that would make that product.

Mr. F. W. Lyon: Your Honor, I intended to prove that any one of these types can be made and assembled at exactly the same price in the world. This witness has testified that it took them three times longer, and I want to know why.

The Court: All right. I see your point. Proceed.

A. Well, the two clamping needles and the spreader had to be held between the fingers of a girl assembling this clamp to get those two heads through the hole. Then the rest of the clamp was assembled in a regular conventional fixture.

Q. (By Mr. F. W. Lyon): And you had no jig——

A. Wait a minute. When that was assembled in that fixture and this spring was in a compressed position, these two clamping pins here projected out of this retaining member in the back of the spring assembly, and those two clamping pins had to be pried apart in order to get that wedge between [47] them, which was a very slow operation.

Q. In other words, you had no jig for putting the clamping pins and spreader through the body by mechanical operation?      A. No.

Mr. F. W. Lyon: I think that is all, you Honor.

Mr. Mason: That is all.

The Court: That is all. Call your next witness.

Mr. Mason: I will call Mr. Mattingly. If your Honor please, may we have a recess so we can mount some exhibits on the board here, some charts?

The Court: Yes. It is time for our afternoon recess.

(Short recess.)

The Court: Proceed, gentlemen.

Mr. Mason: Mr. Mattingly, will you take the stand?

### HAROLD W. MATTINGLY

called as a witness by plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: And your full name?

The Witness: Harold W. Mattingly.

#### Direct Examination

By Mr. Mason:

Q. What is your profession, Mr. Mattingly?

A. I am an attorney at law, specializing in the practice of patent law in the City of Los Angeles.

Q. And how long have you been practicing?

A. Since approximately 1923.

Mr. Mason: Mr. Lyon, do you stipulate as to Mr. Mattingly's qualifications as an expert in this case, or do you wish me to examine him?

Mr. F. W. Lyon: As an expert on patents and patent law, yes, your Honor, that he can read and described what is on the patents.



(Testimony of Harold W. Mattingly.)

The Court: Proceed.

Q. (By Mr. Mason): Have you made any study or have you had any experience in sheet metal clamping art?

A. Yes. I have had occasion to study a number of the sheet metal clamps which have been used for the purpose of holding sheet metal sheets in place prior to riveting and, among other things, I acted as an expert witness in a case in the Southern District of California, the Monogram Company versus F. & H. Company, which was tried in 1943, I believe.

Q. Have you seen these clamps assembled?

A. I have.

Q. Have you seen them in use?

A. I have.

Q. Have you studied the patents in suit Nos. 2,365,787 and 2,364,408? [49]

A. I have.

Q. Are you familiar with them?

A. Yes.

Q. These patents relate to sheet metal clamps. Will you explain the purposes and uses of sheet metal clamps?

A. Sheet metal clamps of the type described in the patents in suit are used as a means of temporarily holding sheets of metal which have been drilled with holes for the reception of rivets in place on other sheets which have been previously drilled, ready for riveting, or upon the supporting structures to which those sheets are to be attached and in which supporting structures holes have previously been drilled through which rivets are to

(Testimony of Harold W. Mattingly.)

be inserted for the purpose of securing the sheets to the supporting structures. The temporary clamps of this type are used in the initial assembly of the sheets on the supporting structure, the temporary clamps being inserted through certain ones of the previously drilled holes to hold the sheet in place with all of the rivet holes of the sheets aligned with corresponding rivet holes in the supporting structure, to thereby not only hold the sheet in place, but to align the rivet holes in the sheets with the rivet holes in the supporting structure during the insertion and riveting of the permanent rivets which are to be used after the permanent rivets have been inserted in the sheets and the supporting structure, and riveted in the [50] balance of the holes not occupied by the temporary clamps. The temporary clamps are removed and the remaining rivet holes are filled with rivets to complete the assembly of the sheet and the supporting structure.

Q. Have you examined and are you familiar with the clamps of the defendant charged to infringe in this case, Exhibits 11 and 12, as well as Exhibits 11-A and 12-A?      A. I have.

Q. And are you also familiar with the defendant's clamp, Exhibit 10?

A. I am familiar with that clamp.

Q. Have you made any charts for use in illustrating your testimony here today?

A. I have.

Q. Are these charts on the board here?

A. Yes.

Mr. Mason: I would like to have these marked for identification, if your Honor please, as Exhibits 16 to 22, inclusive.

The Court: They may be so marked.

Q. (By Mr. Mason): First, I will ask you to refer to patent in suit, Exhibit No. 1; it is patent No. '787; and by using your charts, as well as any of the clamp devices as you may wish, explain to the court the structure of this patent. [51]

A. In patent '787, Exhibit 1, there is described and illustrated a temporary clamp assembly in which the clamp is constructed—if I may step down to the easel here—the clamp is constructed of a body member——

Q. Now, you are referring to what exhibit?

A. ——which is illustrated on Exhibit 16 as a cylindrical outer member to which the reference character 10 has been applied on Exhibit 16, and that is the same reference character that is used in the patent, Exhibit 1, to identify that body. The body 10 is hollow, it is open at its inner end and it is closed at its outer end or lower end, as illustrated in Exhibit 16, by a solid end wall which is integral with the side walls of the body. The end wall of the body is formed with a central opening bored through it, through which is projected a retaining member or assembly, indicated in Exhibit 16 by the reference character 19. That assembly comprises a pair of retaining pins, one on each side of center, the inner ends of which are held together by means of a washer, which does not have a reference character on the drawing, Exhibit 16,



(Testimony of Harold W. Mattingly.)

but which bears the reference character 20 in Figure 1 of the patent, Exhibit 1.

Q. Will you denote that on the drawing in pencil?

A. I will mark Exhibit 16 with the reference character 20 directed to the washer I have just identified.

The retaining pin assembly 19 includes a pair of enlarged [52] pin ends, one formed on each of the pins that go to make up the pin assembly 19, those enlarged ends having been inserted and projected through the central pin in the end wall of the body. The pins, or the enlarged pin ends, are separated from each other by means of a spreader which is indicated by the reference character 25 in Exhibit 16 and by the same reference character 25 in the patent, Exhibit 1.

The spreader 25 is illustrated in the patent as comprising a substantially T-shaped piece of metal, the projecting arms of which are received in a slot which is formed in the outer end of the solid end wall of the housing or body 10, and over the ends of the spreader and between the arms of the spreader and the enlarged ends of the retaining pins 19 there is mounted a cap 27, shown on Exhibit 16, and also referred to as 27 in the patent, Exhibit 1, the cap 27 being made in the form of a cup which is placed over the solid end of the body, and then the upper edge of the cap is rolled or crimped or compressed into a groove which is formed on the side of the body No. 10.

(Testimony of Harold W. Mattingly.)

Q. What is the purpose of that cap?

A. The purpose of the cap is two-fold. Its first function is to hold the spreader 25 assembled on the end of the body, to keep it from falling off of the body and becoming disassembled from the body. Its second function is to cover over the end wall of the body 10 and, with its smooth outer surface, provide a smooth surface which will engage [53] the outer surface of the work sheet to which the clamp is to be applied.

Q. In the course of assembling that clamp, will you state the sequence of operations and state the significance of the cap in that respect, if there is any?

A. I believe that——

Mr. F. W. Lyon: If your Honor please, I object to this testimony. Nowhere in the patents is there any statement concerning the method of assembly of these devices, nor is there any suggestion of any assembly. If he is testifying as to how they actually do it, that is one thing; but, as to him testifying as to how the patent teaches it, that is another matter.

Mr. Mason: If your Honor please, the patentee is entitled to all the advantages to which the structure shown in the clamp may be put. It may be necessary to state any particular method of assembly. I want the witness merely to explain to the court what he knows about the way that the clamp is assembled, so that your Honor may have a clear understanding of it.

(Testimony of Harold W. Mattingly.)

Mr. F. W. Lyon: If it is limited that way, I withdraw the objection.

The Court: There is no objection to that procedure. Proceed, Mr. Mattingly. [54]

A. The assembly of the type of structure shown in Exhibit 16 and in the patent, Exhibit 1, is best illustrated in the drawing, Exhibit 20, which I have had prepared to show the theories of successive steps employed in the assembly of the clamp.

In Figure 1 of Exhibit 20 I have illustrated the component parts of a clamp of this type as comprising a pair of retaining pins——

Q. (By Mr. Mason): Will you give those a reference character?

A. I will call these two pins and mark them with the letter A; another of the component parts is a spring, which I will mark B; another of the component parts is a body, which I will mark C; another of the component parts is a T-shaped spreader, which I will mark D; and another of the parts is the cap, which I will mark E.

In the particular form of clamp illustrated in Exhibit 20, the pins are to be retained, that is the inner ends of the pins are to be retained assembled together, by means of a washer, which I will mark E (F); and in this particular form illustrated here, the two pins A have their inner ends spread apart to fill the circular opening in the washer E (F) by means of a little strip of metal, which I will mark——



(Testimony of Harold W. Mattingly.)

The Reporter: You have got two "E's" now.

A. I beg your pardon. May we mark the washer as F and the strip of metal I just identified as G.

The type of assembly illustrated in Exhibit 20 is that exemplified by Exhibit 5 with the parts A to G as illustrated in Exhibit 20. The start of the assembly is to make a sub-assembly of the pin or retaining pin unit. The first step is illustrated in Figure 2, where the two pins A have been placed face to face and the strip of metal G has been inserted in the inner ends—between the inner ends of the pins A.

The washer F is ready now to be slipped over the ends of the pins to hold them together in a unit, which is illustrated in Figure 3. The next step in the assembly is to place the spring B about this unit which has just been assembled, and that makes the assembly ready to receive the body C. The body C has the internal bore similar to that illustrated in Exhibit 16 to receive the spring and the pin assembly.

Now, the body is illustrated in Exhibit 20 as having a relatively fair-sized opening in its outer end which is ample to receive and pass the enlarged heads of the pins, as long as they are not spread apart by the spreader, so that the assembly of the spring, pin, and body can be readily accomplished merely by pressing the pins on through the body from the inner end of the body, which, as I pointed out, is open as illustrated in Exhibit 16.

(Testimony of Harold W. Mattingly.)

In Figure 5 I have shown the operation which has occurred upon the compression of the spring by forcing this pin [56] assembly through the hole in the outer end of the body; and I have illustrated here, diagrammatically, a jig which will accomplish that, as comprising one member, which I will mark H, to engage and hold the body while a plunger, which I will mark P, is forced upwardly to project the pin assembly through the body.

After the parts are in the position as shown in Figure 5, it will be noted that the pins or the clamped ends of the pins have been projected some considerable distance beyond the outer end of the body, so that at that time the spreader D may be inserted laterally in the space between the pin ends. That is the position that the parts assume when the pins are projected as in the normal operation of the clamp, with the operating tool or gun. With the pins in this projected position as shown in Figure 5, the spreader is merely inserted laterally through the space between the two pins. It rests on the outer end of the body, and the assembly is now ready to receive the cap which I have illustrated in Figure 6.

The cap can now be placed over the enlarged ends of the pins, because at this time it will be noted that the enlarged heads on the pins are now close together, and the total distance across the enlarged heads is equal to or less than the diameter of the hole in the cap E. The cap having been placed on over the outer projected ends of the

(Testimony of Harold W. Mattingly.)

assemble, as shown in Figure 7, the entire clamp has now been assembled and will hold itself together if the jig is released.

In Figure 8 I have illustrated the assembly as it stands at that stage of the proceedings. It is now capable of being taken out of the jig and all of the parts will hold themselves together.

In Figure 9 I have illustrated diagrammatically the [58] final operation, which is the crimping of the edges of the cap about the end of the body, and it will be noted that there is a shallow groove formed on the end of the body, so that the pieces of metal of the cap may be pressed in it, to secure the cap in place so that it will not fall off during the operation or the subsequent use of the assembled clamp.

Q. Are you familiar with the type of clamp structure exemplified by Plaintiffs' Exhibit 10, which is one of the defendant's devices, and by Defendant's Exhibit C, which is one of plaintiffs' devices? A. I am.

Q. Now, do you know how that clamp is assembled, that is, at least as to Defendant's Exhibit C.

A. Defendant's Exhibit C is assembled by a series of steps which I have illustrated in Exhibit 22.

Exhibit C distinguishes primarily from the type of clamp shown in Patent '787, Exhibit 1, and in Exhibit 16, and in the assembly views in Exhibit 20, by reason of the fact that the body of the clamp is formed with a solid end wall, having a center



(Testimony of Harold W. Mattingly.)

opening through the end wall, and the finished assembly does not apply a cap. Instead, the spreader D in the form of Exhibit 10 and Exhibit C, the cross arms of the spreader are located inside the body, and in order to assemble that structure it is necessary to assemble the spreader from the open end of the body. [59]

In Exhibit 2 I have illustrated in Figure 1 the component parts, which I will mark——

Mr. F. W. Lyon: These are the component parts of what device?

The Witness: The component parts of Exhibit 10.

Mr. F. W. Lyon: Exhibit 10 or Exhibit C.

The Witness: I might at this stage of the game say that the component parts of Exhibit 10 and Exhibit C are substantially alike, and I will make a comparison first as to Exhibit 10—I beg your pardon—first as to Exhibit C, and then as to Exhibit 10.

Mr. F. W. Lyon: Well, aren't you testifying as to how these are assembled?

The Witness: That is right.

Mr. F. W. Lyon: And Exhibit 10 and Exhibit C you have seen assembled, both of them, in this same manner?

Mr. Mason: I have asked him to testify as to the assembly of Exhibit C.

Mr. F. W. Lyon: That is what I thought, but he changed it to Exhibit 10.

(Testimony of Harold W. Mattingly.)

The Witness: May I check? Exhibit C is a Monogram structure, is it?

Mr. F. W. Lyon: That is right.

The Witness: Then this is Exhibit C I am comparing this with. Is that right? [60]

Q. (By Mr. Mason): Yes. You have seen that assembly?

A. Yes. The component parts of Exhibit C include the pins, which I will mark A, a piece of metal to be interposed between the inner ends of the pins A, which I will mark G, a cap member, or a tubular member, having an enlarged head, which I will mark F, corresponding substantially to the washer F shown on Exhibit 20, a spring which I will mark B, a spreader which I will mark D, a body which I mark C, a washer which I will mark M.

Now, in assembling this type of clamp, the first step is illustrated in Figure 2, in which the two pins A are held together, but the spreader D has been inserted in between the two pins and is held in place between those two pins by the friction of the two pins being placed together with that piece of metal in between them.

The assembly of that clamp may be finished by applying the washer M between the little enlargements on the ends of the pins and the cross bar of the spreader so that when that washer is finally pushed in, it will push the spreader on into the body, as I will point out in further steps of the operation.

(Testimony of Harold W. Mattingly.)

The body, as I have illustrated, has the center hole in it, through which the pins must project, and in order to facilitate those pins going through that small hole, it is usual to shift the pins longitudinally relative to each other, [61] as I have indicated in Figure 3.

Q. Why is that?

A. The two heads are approximately, that is, when they are exactly in alignment with each other, are approximately of the same width as the diameter of the hole they have to go through, and it is rather a ticklish job to insert a piece of metal of exactly the same size through a hole than it is if you can reduce the diameter and make them in a sense self-threading. That is shown in Figure 3.

In Figure 4 the pins have been projected through the hole in the body, and the assembly is now ready to receive the spring. During this portion of the assembly the spreader is still retracted well toward the inner ends of the pins, and it is necessary to move that spreader now on through the body, and attempt to project it through the hole at the end of the body and in the space between the projected ends of the pins. The spring is then placed over the inner ends of the pins, and the spring may then be forced on into the body a sufficient distance to frictionally move the spreader on through to project its long leg out through the hole and into the space between the two pin ends, and to bring the cross bar so that T-shaped spreader is



(Testimony of Harold W. Mattingly.)

against the inner surface of the end wall of the body.

Q. What prevents the longer arm of the spreader from shifting laterally and missing the hole as you push it down? [62]

A. There is nothing that prevents that except the attempt to apply the moving force evenly on both sides of the projecting arms of the spreader. In other words, you are hoping that it will remain in alignment and will go through the hole at the opposite end of the body.

Q. As I understand you, then, that operation which you described is necessary because you cannot insert the spreader and the headed ends of the pins through the small hole in the body at the same time?

A. That is correct. The only possibility is of attempting to hold the spreader as close to the ends, to the enlarged ends of the pins, as you can during the time the pins are being placed through the hole. They cannot be in their normal position out at the ends of the pins at the time of that assembly because the hole is not big enough for that assembly to go through.

Q. Whereas in the cap type of assembly, Exhibit 20, you can push the pins through in any way, and later apply the spreader from the other end; is that right?

A. That is correct, and you do not have any problem of attempting to hold a loose piece of

(Testimony of Harold W. Mattingly.)

metal loosely between two other pieces of metal, in attempting to make the assembly.

In Figure 5 I have illustrated the next step in the assembly, in which you will place about the inner ends of the pins some retaining member, which will hold those ends of the [63] pins together. In this illustration in Figure 5 the cap or plunger member F is placed over the inner ends of the pins, and the cap is then pressed home into the body, to compress the spring by means of some jig, which I have illustrated diagrammatically in Figure 6 as including an anvil, which I will mark H, and a plunger, which I will mark P.

When the plunger P is moved up toward the anvil H, the plunger P engages the enlarged head portion of the cap or plunger F, and presses all of the cap or plunger and the spring into a compressed position within the body.

At that point the mechanism must have something applied to keep the plunger F from being driven back off of the inner ends of the pin, and in the type of clamp shown in Exhibit C, that is accomplished by performing the operation of spreading the inner ends of the pins as by means of a screw-driver, and then inserting the strip of metal G between the spread ends, and then finally that strip of metal is driven in until it is flush with the inner ends of the pins, at which time the jig may be released, and the entire assembly is held together as I have indicated in the last figure of this sketch, which I will mark Figure 10.

(Testimony of Harold W. Mattingly.)

Q. Now, do you have a drawing of Exhibit 11?

A. Yes, I have a drawing which is marked Exhibit 17, which I had prepared after observing and disassembling—I beg your pardon—after observing and studying the [64] construction of Exhibit 11 and 11-A, which is the cutaway model, in which the body has been sliced or ground away, so that you can see the interior mechanism.

Q. Now, will you explain that structure?

A. The structure——

The Court: Exhibit 11 is the clamp manufactured by the defendant, and is referred to in the stipulation. That is correct, is it not?

Mr. Mason: Yes, your Honor.

Mr. F. W. Lyon: Yes, that is the defendant's clamp.

Mr. Mason: That is one of the clamps charged to infringe.

The Court: All right.

The Witness: In the drawing, Exhibit 17, I have shown the clamp as comprising a body 5, which is a hollow tubular member. In this instance it is open at both the inner end and the outer end.

Mr. F. W. Lyon: Would you please mark—you have a red pencil there—which end you call the inner end and which the outer end?

The Witness: The outer end is the body I will mark in red with the legend “outer,” and the inner end of the body I will mark with the legend “inner,” and throughout the testimony I will try to keep those designations uniform.



(Testimony of Harold W. Mattingly.)

By the outer end I mean the end of the body which will be projected toward the surface of the sheets through which [65] the clamps are to be placed, and the inner end of the body will be at the end which is at that time toward the operator of the gun or the person who is inserting the clamp in place.

Then at body 1 there is located a retaining member assembly, which comprises a pair of retaining pins, indicated at 20, which are held together at their inner ends by means of a washer, which I will designate as W. The outer ends of the pins project through the body and beyond the end of the body, and have enlarged heads on them, which ends are held apart or spread by means of a T-shaped spreader 25. The cross arms of the spreader 25 extend across the body and are held in place between a pair of washers, which I will mark as Wa and Wb. The spreader is also held in place on the body by means of a cap, indicated at 11, which is a cup-shade cap, having a central opening through which the pins of the—through which the enlarged ends of the pins and the spreader project. The edges of the cup-shaped cap are crimped or pressed into a groove which extends about the surface of the body 5. To engage and operate the pin assembly to project the pins outwardly beyond the spreader 25, there is a plunger 17, or you can call it a plunger or a thimble 17, which is located within the inner end of the body and bears against the assembly pins and washer W. The operating tool

(Testimony of Harold W. Mattingly.)

or gun engages the plunger 17 and forces the pins outwardly against the force of a spring 32, and when the gun is released, the spring 32 retracts the [66] pins 20, to engage the pins between the enlarged heads of the pins and the outer surface of the cap 11.

Q. Now, does the end cap 11 in Exhibit 17 provide the same advantages in assembly as the end cap which you have described in Exhibit 16?

A. Yes. It allows the assembly to be put together with greater ease than if no cap was used, and, in fact, without a cap this particular structure illustrated in Exhibit 17 could not be assembled.

One thing that I failed to mention in my description of this type of clamp was that the plunger 17 has a radially flange 16 formed on it, while the bore of the body has a reduced diameter portion, which I will refer to as 33. So that the assembly in this case must be that the plunger 17 must be placed in from the outer end of the body prior to the insertion of the assembled spring, pins, and spreader, and cap.

Mr. F. W. Lyon: If your Honor please, I object to the last question and move that the answer be stricken. I would like to ask the witness just one question on voir dire.

The Court: Ask the question.

Mr. F. W. Lyon: Have you ever seen a clamp such as Exhibit 11, I believe it is, assembled?

(Testimony of Harold W. Mattingly.)

The Witness: I have not watched the operation of any assembly of a clamp like Exhibit 11.

Mr. F. W. Lyon: Then I move that his answer be stricken, [67] that it has an advantage over the method of the patent, in that he has never seen and at present he has no way of knowing how that device is assembled, other than by what he figures.

The Court: I think, counsel, that goes to the weight of his testimony, the fact that he hasn't seen it. As to the construction of a device that is not a complicated one, I do not believe it would take an expert to say how it was assembled. He could look at it and say. So it goes to the weight of his testimony.

Mr. F. W. Lyon: Well, he is mentioning something he has seen as against something he has never seen. He stated he saw Exhibit 5 assembled and knows how much time it took. He testifies that he saw Exhibit C assembled and knows how much time, but he does not know the time it took to fabricate Exhibit 11.

Mr. Mason: I didn't ask him how long it took.

The Court: Well, it goes to the weight, counsel. All right; proceed.

Q. (By Mr. Mason): Do you have a drawing of Exhibit 12?

A. I do. That is marked Exhibit 18.

Q. Will you explain that?

The Court: Now, this is alleged to be infringed, also?



(Testimony of Harold W. Mattingly.)

Mr. Mason: That infringes patent '787, your Honor, but not patent '408.

A. The clamp, Exhibit 12, I have illustrated by the drawing, Exhibit 18, as comprising a body pin which is initially formed as being open at both the inner end and its outer end. The body has a pin, retaining pin assembly, which comprises a pair of pins indicated by the number 19 which are held together at their inner ends by means of a washer, which I will mark W. The outer ends of the pins are formed with enlarged heads which project through a pair of washers Wa and Wb, and through an end cap 27. Between the washers Wa and Wb there is located a spreader 25, the cross-bar of which is located between the two washers, while the long leg of the spreader projects longitudinally through the opening in the cup-shaped cap 27, to be located between the enlarged ends of the pins.

The operation of the pins, that is the projection of the pins outwardly of the body, is performed by means of a [69] gun or operating tool which will engage a plunger, which I will mark 50, that bears against the assembled washer and the inner ends of the pins W; and when that plunger 50 is pressed inwardly of the body it will project the enlarged ends of the pins to their projected position, and when the gun is released, a spring, which I will mark S, will retract the assembly to clamp the work pieces between the enlarged heads of the pins and the outer surface of the cap—the cap is 27. The

(Testimony of Harold W. Mattingly.)

bore through the body has a smaller diameter portion at the inner end of the body so as to prevent the plunger 50 from passing out of the inner end of the body under the influence of the spring S.

Q. Have you read claim 11 of patent '787?

The Court: What is that question?

(Question read by the reporter.)

The Court: That is a new subject, gentlemen. It is a quarter to five. Take a recess until 10:00 o'clock tomorrow morning.

(Whereupon a recess was taken until 10:00 o'clock a.m. of the following day, Thursday, January 23, 1947.)

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Los Angeles, California, Thursday, January 23,  
1947, 10:00 A.M.

Mr. Mason: Will you resume the stand, Mr. Mattingly?

HAROLD W. MATTINGLY

recalled.

Direct Examination

(Resumed)

By Mr. Mason:

Q. Mr. Mattingly, will you refer to claim 11 of patent '787 and to the Plaintiff's Exhibits 10 and 11, as well as to the drawings, Exhibits 17 and 18, and

(Testimony of Harold W. Mattingly.)

state whether or not you find embodied in Exhibits 10 and 11 the subject matter described in claim 11?

A. I have here some copies of claim 11 from patent '787 which I prepared in the form of a break-down of the claim into the various elements covered by the claim, and it may be helpful to follow the various elements by referring to those sheets.

Claim 11 of the patent '787 defines:

“A clamp for holding perforated sheet together in superposed relation,”——

which is the type of clamp we have been discussing here, both as shown in the patent and as manufactured by the defendant and illustrated in Exhibits 11 and 12 and the drawings 17 and 18. [72]

The first element of that claim is

“a cylindrical body.”

That is identified in the patent in suit by the reference character 10 and on Exhibit 16, the drawing, shows the cylindrical body by the reference character 10. In the defendant's clamp, Exhibit 11, and on the drawing, Exhibit 17, the cylindrical body, which is the outer sleeve, is referred to by the reference character 5.

In the defendant's clamp, Exhibit 12, and on the drawing, Exhibit 18, the cylindrical body is referred to by the reference character 10.

The next element of the claim is

“a laterally flexible retaining member reci-



(Testimony of Harold W. Mattingly.)

procally mounted in the body for protraction and retraction through the outer end of the body,"——

In the patent '787 the laterally flexible retaining member is the retaining pin assembly referred to by the reference character 19, which includes a pair of pins which are laterally flexible toward and away from each other when they have been projected beyond the end of the spreader. They must be laterally flexible in order that the enlarged heads on those pins can be drawn together sufficiently to permit them to pass through the holes in the work sheets.

In defendant's clamp, Exhibit 11, and as shown on the drawing, Exhibit 17, the laterally flexible retaining member [73] is referred to by the reference character 20 and comprises the pair of pins with the enlarged heads, which, when they are projected forwardly beyond the end of spreader 25, can be flexed toward each other for the same purpose of permitting the enlarged heads to be inserted through the work sheets.

The next element—I should go on. In Exhibit 12 the laterally flexible retaining member is referred to by the number 19, and again comprises a pair of pins which can flex toward each other to bring their enlarged heads into a narrower space for insertion through the work sheets.

The next element of the claim is:

“a spreader bar having lateral sliding engagement with the retaining member,”——

(Testimony of Harold W. Mattingly.)

In the patent the spreader bar is a T-shaped piece of metal indicated at 25, and that is shown on drawing 16, Exhibit 16, as T-shaped spreader 25. In the defendant's clamp, Exhibit 11, and on drawing, Exhibit 17, the spreader is a T-shaped spreader indicated by the reference character 25; and in Exhibit 12 and Exhibit 18, the spreader is also referred to by the reference character 25 and comprises a T-shaped piece of metal disposed between the two retaining pins. [74]

The spreader in each instance is held stationary with respect to the body while the pins are slidable into and out of the body, and hence the spreader is slidable with reference to the pins.

The third element, the spreader, in the Claim 11 of Patent '787 is further defined by the language "said spreader having an angularly disposed inner end portion," and that refers to the cross bar or the top of the "T," which has projecting portions extending laterally on each side of the spreader for the purpose of retaining the spreader within the assembly.

That, as I pointed out, the spreader in the defendant's clamps, both Exhibit 11 and Exhibit 12, is a T-shaped spreader and has the angularly disposed inner end portion.

The next element of the claim is "means for holding the spreader bar against outward longitudinal movement relative to the body." The means that is shown in Patent '787 and on Exhibit 16 is the cap which is referred to by the reference character 27.

(Testimony of Harold W. Mattingly.)

In Exhibit 11, and particularly on the drawing Exhibit 17, the cap is referred to by the reference character 11, and consists of the outer cup-shaped cap.

In the defendant's clamp, which is Exhibit 12, and in the drawing Exhibit 18, this means for holding the spreader is the cap referred to by the reference character 27.

The definition of that element continues "the last-named [75] means consisting of a cover cap having a cylindrical skirt secured to the outer end portion of the body periphery."

The cap in each instance, as I pointed out, is a cup-shaped cap. The cylindrical skirt portion of the cap is secured to the exterior of the outer end of the body member.

The Court: And also side, isn't it? The end and side?

The Witness: The cap covers the ends, with the cylindrical portions of the cap extending about and secured to the outer end portion of the body.

The definition of that means or cap continues in the claim as "an end wall whose inner surface provides an abutment for the angular portion of the spreader bar and whose outer surface provides a sheet-engaging portion."

In the patent the cap, when it is placed on the body, engages these extending ears or projections on the spreader bar and prevents the spreader bar from being forced outwardly away from the body, while the outer surface of the cap provides a smooth



(Testimony of Harold W. Mattingly.)

surface for engaging the surface of the sheets when the clamp is in place in the work sheets.

In the defendant's clamp, Exhibit 11, and as shown in Exhibit 17, the spreader bar with its projections is held from outward movement relative to the body by reason of the fact that the cover cap 11 provides an abutment against which the lateral projections on the spreader bar may engage and be held in place. [76]

The same is true of defendant's clamp, Exhibit 12, and as shown on Exhibit 18, the cap provides an abutment for engaging the lateral projections on the spreader bar and prevents the disassembly of the spreader bar from the remaining structure, and in each instance, both in Exhibit 11 and Exhibit 12, the outer surface of the cap provides a work-engaging surface for engaging the work sheets.

Q. (By Mr. Mason): Now, have you finished?

A. Yes.

Q. Now, will you take Exhibits 11-A and 12-A, which are the cut-open models and point out to the court the cap structure and spreader assembly that you have referred to.

A. In Exhibit 12-A the cap structure is the cylindrical or cup-shaped cap which goes about the outer end of the body and has been crimped or secured into the little annular groove that is formed near the outer end of the body. The spreader is the small piece of metal, which I believe here is T-shaped and has the lateral projections which can be seen between the two washers at the outer end

(Testimony of Harold W. Mattingly.)

of the body, and the lateral projections are prevented from passing out of the end of the assembly by means of the cap.

There is a washer, which I have indicated on Exhibit 17 as a washer Wb. That is an extra piece of metal which is inserted just behind the inner surface of the cap, and I believe its function is to permit a thinner piece of metal to be used [77] for the structure of the cap.

In Exhibit 11-A we find the same assembly, in which the cup-shaped cap is secured to the outer end of the body and provides an abutment for the extending cross pieces of the spreader bar and prevents the spreader bar from moving outwardly; and in both of those exhibits, 11-A and 11-B, the outer surface of the cap is, of course, the surface which engages the work surface when the clamps are in place in the sheets.

Q. You are referring to Exhibits 11-A and 12-A?      A. 11-A and 12-A.

Mr. F. W. Lyon: I would like to offer a stipulation, if I might, as to these two clamps, so far as this first patent is concerned. We will stipulate that both Exhibit 11 and Exhibit 12 are identical and that any testimony referring to Exhibit 11 can be applied directly to Exhibit 12, because the only difference is in this element 17 up here at the top. One has one extending out and the other stays all the way in, and that has nothing to do, I believe they will agree, with the first patent.

Mr. Mason: I will so stipulate.

(Testimony of Harold W. Mattingly.)

Mr. F. W. Lyon: So we will not have to repeat the testimony as to each model.

The Court: It will be so understood.

Mr. F. W. Lyon: If Exhibit 11 infringes, why, Exhibit 12 [78] does.

Q. (By Mr. Mason): Did you complete your answer? A. Yes.

Q. Now, will you refer to Patent '408, and also using your charts, as well as the clamp devices, as you may desire, describe and explain the structure of that patent.

A. Patent '408, which I believe is Plaintiffs' Exhibit 2, discloses a clamp of the type we have been discussing here.

The Court: Now, which one are you referring to?

The Witness: Exhibit 2 is Patent No. '408, and I have an enlarged view of one of the figures from that patent, which I had prepared and is identified as Plaintiffs' Exhibit 19.

In Patent '408, and as shown in Exhibit 19, the clamp in this case consists of a tubular or cylindrical body member, which is identified by the reference character 5. The retaining pins identified as 20 comprise a pair of pins which are held together at their inner ends by means of a sort of washer or cover, which connects the two pins together. The two pins extend through an opening in a closure or a washer at the outer end of the body, and also project through a cap member 11, which is secured to the outer end of the body. Between



(Testimony of Harold W. Mattingly.)

the washer and the cap 11 there is disposed a T-shaped spreader 25, which performs the same function of spreading the enlarged headed ends of the pins as the pins are drawn inwardly of the body to engage the work sheets. [79]

A spring 32 is employed to normally urge the pins inwardly of the body and to hold the pins retracted, and the pins are protracted or extended from the body by means of an operating tool or gun, which will engage a thimble 17, which extends about and engages the inner ends of the pin assembly.

The thimble 17 is provided with a radially extending flange, which is designated by the reference character 16, and in the patent the description of the construction of the body 5 is that at its inner end there is a radially inwardly extending shoulder or flange which is designated by the reference character 33. The patent describes this structure as one which is particularly useful in the assembly of the clamps, in that once the assembly has been completed the breaking of the pins or the wearing off of the enlarged heads of the pins, which would otherwise let the spring and pin structure be completely drawn into the body and projected out of the inner end of the body, is prevented by use of the thimble and the flange 33, which in this instance encloses the spring and the pin assembly, so that even though the pins should break they can't escape from the body and can't cause any in-

(Testimony of Harold W. Mattingly.)

jury to workmen or people who have to be using these. [80]

Q. In that case you have a double lock, is that true?

A. That is true. The first lock would be the cap 11, which, as long as the enlarged heads are in the pins and the spreader disposed between them, prevents the passage of the enlarged heads or the ends of the pins back into the device. The second lock or the safety lock is the interengagement of the shoulders or flanges 16 and 33, which, even though something should happen to these pins and they became entirely broken off, the spring and pin assembly will still be retained together and cannot fly apart.

Q. You have mentioned that the retaining pins 20 are protracted from the body by means of a tool engaging the element 17. Do you mean a tool of the character of Exhibit 15?

A. Yes.

Q. Now, will you refer to Exhibit 11 and Exhibit 17 and state whether or not you find in those exhibits a structure defined in claims 1 and 2 of patent '408?

A. I have here some sheets that I prepared, comprising a break-down of claims 1 and 2 of patent '408, which will help to follow the testimony.

Claim 1 of patent '408 describes:

“A sheet metal clamp, comprising, in combination,” the following elements:

The devices that we are discussing here are

(Testimony of Harold W. Mattingly.)

known [81] generally as sheet metal clamps. The first element of claim 1 is:

“a cylindric body,”——

identified in the patent '408 by the reference character 5. In defendant's clamp, Exhibit 11, and the drawing, Exhibit 17, the cylindrical body is identified by the reference character 5.

The second element of the claim is:

“an end cap secured on the body in position closing the outer end thereof”——

In patent '408 that is the end cap 11 which is inserted into and closes the outer end of the cylindrical body. The patent describes the fact that this cap is inserted and then the material of the cylindrical body is swedged or peened over to hold the cap in place. In the defendant's clamp, Exhibit 11, and in the drawing——

The Court: Let me interrupt you. I think we can push that easel back a little so that all parties can see it more clearly. It will not interfere with the court's vision. I do not mean back that way. I mean over a little more yet. Can you see that better?

Mr. F. W. Lyon: Yes.

A. In defendant's Exhibit 11—I mean in the defendant's clamp, Exhibit 11, and in the drawing, Exhibit 17, the end cap is identified by the reference character 11 and comprises [82] that cup-shaped cap which has its skirt secured to the outer end of the cylindrical body; and the cap 11 acts



(Testimony of Harold W. Mattingly.)

as a device for closing the otherwise open outer end of the body. The same is true in defendant's clamp, Exhibit 12, and in the drawing, Exhibit 18.

Mr. F. W. Lyon: Please eliminate Exhibit 12, as counsel stipulated that does not infringe this patent.

The Witness: Oh, I beg your pardon.

Mr. Mason: We are only contending that Exhibit 11 infringes patent '408, your Honor.

A. The definition of the second element, namely, the end cap, in claim 1 of patent '408 continues:

“said cap presenting an opening there-through,”——

The opening in the patent is designated by the reference character 12, which is the central opening through which the pins and the spreader project. In the defendant's clamp, Exhibit 11, the central opening is the center hole through which the pins and spreader project, and I have indicated that on Exhibit 17 by the reference character 12.

The definition of that cap continues:

“a dished inner portion, and an outer work-engaging portion,”——

In the patent the dished inner portion is the depression on the inside of the cap 11, and the outer work-engaging——

Mr. F. W. Lyon: Would you give that portion, the part [83] that you just referred to, a number, Mr. Mattingly, so we will have a reference to it?

(Testimony of Harold W. Mattingly.)

A. I will mark that with the red pencil as 51. That is the inner surface of that end cap and, of course, the outer work-engaging portion is the outer surface of the end cap 11. In Exhibit 11 and on Exhibit 17 the end cap 11 is, as I have described, a cup-shaped cap which has its inner surface substantially a dished shape, while its outer surface forms the work-engaging portion. The dished shape which is required by those caps is for the purpose of providing a space for the accommodation of the cross-bar of the spreader, and in the patent '408 the end cover has to have some space between it and the backing washer, and in the case of the patent the dished shape is provided there so that the cap can be inserted within the body and secured to it; whereas, in the defendant's clamp, Exhibit 11, the cap is applied to the exterior of the body and its dished shape is for the purpose of providing sufficient material to secure the cap to the body and to provide a space for the reception for the cross-bar of the spreader.

Mr. F. W. Lyon: Just a minute. Mr. Reporter, he referred to a washer in there that I do not believe has any number. Would you read that question and that answer, just at the tail end, and have him put a reference number on that washer? [84]

(Record read by the reporter as requested.)

Mr. F. W. Lyon: What number did you give that backing washer?

A. I gave the backing washer the number "9".

(Testimony of Harold W. Mattingly.)

That is the number which is used to identify that washer in the patent '408; and I have marked Exhibit 19 with the reference character 9; I also mark Exhibit 17 with the reference character 9 to extend to the corresponding washer which I have previously identified as Wa.

The next element of claim 1 is:

“a plunger reciprocally mounted in the body, said plunger presenting a pair of work-engaging pins protractable and retractable through said opening,”——

In the patent '408 the washer reciprocally mounted in the body is the assembly of the two pins 20 with their inner ends secured together by means of the washer at the inner ends of the pins; and they are reciprocable with reference to the body under the influence of the operating tool such as Exhibit 15, and are retractable into the body under the influence of the spring 32.

In defendant's Exhibit 11 and as shown on Exhibit 17 the plunger comprises the assembly of the two pins which I have indicated at 20, held together by means of the washer W at their inner ends and projectable through the opening 12 in the cap, the assembly being projectable or protractable [85] by the operating tool such as Exhibit 15, and the assembly being retractable under the influence of the spring 32.

The next element of the claim is:

“spreader means for separating the pins, in-



(Testimony of Harold W. Mattingly.)

cluding a T-shaped bar having its cross arm disposed in the dished portion of the cap and having its center arm projecting outwardly from the cap through said opening and between the pins to a point spaced outwardly from the outer surface of the cap,"——

In patent '408 that is the spreader bar 25, which has its cross arms located within and engagable by the inner surface of the cap, while the center arm, which is identified as 25a, projects through the opening 12 of the cap between the two pins and extends outwardly beyond the outer surface of the cap. In Exhibit 11 and as shown on Exhibit 17 the spreader is the T-shaped spreader having its cross arm disposed within the dish of the cap and engaging the cap to prevent its being displaced, while the center arm, indicated at 25a, projects through the opening 12 in the cap and extends beyond the surface of the cap.

The next element of the claim is:

"an inwardly disposed flange on the inner surface of the body adjacent to its inner end,"——

In the patent '408 that inwardly disposed flange on the inner surface of the body is the flange 33, which is [86] a narrow flange extending inwardly into the bore of the body. In defendant's clamp, Exhibit 11, and in Exhibit 17 the flange at the inner end of the body is indicated at 33 and comprises a shallow flange which projects inwardly of the bore of the body.

(Testimony of Harold W. Mattingly.)

The next element of the claim is:

“a coil spring in the body around and re-tractively engaging the plunger,”——

In the patent that spring is the spring 32 which surrounds the pins 20 and engages the inner ends of the pins and their assembly washer to normally retract the pins into the body. In Exhibit 11 and Exhibit 17 the spring 32 surrounds the pins and engages the inner ends of the pins and their assembly washer to permit the function of retracting the pins into the body.

The next element of the claim is:

“tool operated means for protracting the plunger against the pressure of said spring, comprising a plunger-engaging member reciprocally mounted in and projecting from the inner end of the body for manual engagement,”——

In the patent that is described as a thimble 17, which engages the inner ends of the pins and which projects outwardly from the inner end of the body, to be engaged by the operating tool such as Exhibit 15.

The definition of that last element continues:

“said member having a relatively increased diameter inner and portion engagable against said flange when the plunger is in fully retracted position.”

In the patent '408 the thimble is formed with

(Testimony of Harold W. Mattingly.)

the radially extending flange 16 which extend out sufficiently far to be engaged by the flange 33 when the thimble is in its extreme retracted position. In the defendant's clamp, Exhibit 11, the thimble 17 is provided with a radial flange 16 which engages the flange 33 when the thimble is in its fully retracted position, and the thimble 17 in this instance extends out of the body 5 to be engaged by the operating tool such as Exhibit 15.

Claim 2 of the patent '408 recites?

“A sheet metal clamp, comprising, in combination, a cylindric body”——

Designated by the reference character 5 and which I have identified as 5 both on Exhibit 19 and on Exhibit 17 which is the illustration of defendant's clamp Exhibit 11.

The next element:

“and end cap mounted on the body in position closing the outer end thereof”——

This is the 11 shown in patent '408, which I have compared with the 11 on Exhibit 17.

The definition of that element continues:

“said cap presenting an opening there-through and a [88] work-engaging outer surface,”——

That is the opening 12 through which the pins and spreader project, and that is found in Exhibit 11 and Exhibit 17 as the central opening 12 through the cap 11.



(Testimony of Harold W. Mattingly.)

The next element of the claim:

“a plunger reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,”——

That is the assembly I have identified as the pin assembly 20, with its washer W, should on Exhibit 17.

The next is:

“a spreader member having a laterally projecting inner end portion disposed in the cap and an outer end portion projecting outwardly through said opening in engagement with the work-engaging member,”——

That is the spreader 25, the cross-bar of which is disposed within the cap 11, as shown in Exhibit 17, and whose outer end portion 25a projects out through the opening and is engaged on each side by the ends of the pin members 20.

The next element of the claim is:

“an inwardly disposed flange on the inner surface of the body at its inner end,”——

and that is the flange 33 which is formed on the body at its inner end and projects inwardly of the bore in the body.

The next element is: [89]

“a coil spring in the body around and retractively engaging the plunger,”——

(Testimony of Harold W. Mattingly.)

that is the coil spring which I have identified on Exhibit 17 as the spring 32.

The next element is:

“tool-operated means for protracting the plunger against the pressure of said spring comprising a plunger-engaging member reciprocally mounted in and projecting from the inner end of the body for manual engagement, said member having relatively increased diameter inner end portion engagable against said flange when the plunger is in fully retracted position.”

And that is the thimble 17 which is adapted to engage and operate the pins when the device is operated by means of the tool such as Exhibit 15; and it has a radially extending flange 16 or enlarged diameter 16 to engage the flange 33 when that plunger is in its fully retracted position.

I believe that I in my testimony reversed the reference characters 16 and 33. The patent describes the flange on the body which extends inwardly of the body as “a flange 16.”

Mr. F. W. Lyon: I would not do that, Mr. Mattingly, on that one. You are on the exhibit of our drawing and you have, away back in the other, referred to that in the other case.

The Witness: Well, wherever I have referred to the [90] flange which extends inwardly of the body, that should be identified as “16” and the

(Testimony of Harold W. Mattingly.)

enlarged diameter on the thimble should be referred to as "33."

Q. (By Mr. Mason): Have you examined the clamps of the plaintiffs, Exhibits 5, 6, and 7?

A. I have.

Q. Have you examined those in disassembled form? A. I have.

Q. And do you find that those clamps, Exhibits 5, 6, and 7, embody the structure which you have discussed as being shown by claim 11 of the patent '787? A. Yes.

Q. And have you found that the clamp, Exhibit 6, embodies the structure of claims 2 and 3 of patent '408? A. Yes.

Mr. Mason: You may take the witness, Mr. Lyon.

The Court: We will take our morning recess. It is five minutes to eleven.

(Short recess.) [91]

Mr. F. W. Lyon: Before we proceed, your Honor, I think we have a stipulation to make, that Plaintiffs' Exhibit No. 7 does not embody the features of the second patent, the '408 patent, the patented features.

Mr. Mason: That is correct. It does not come within the terms of Claims 1 and 2, your Honor. However, it does embody the invention of '787.

Mr. F. W. Lyon: I mean, there is no claim this was within the features of the second patent?

Mr. Mason: No.



(Testimony of Harold W. Mattingly.)

The Court: It does not come within Claims 1 and 2 in which patent?

Mr. F. W. Lyon: '408, sir.

The Court: All right.

### Cross-Examination

By Mr. F. W. Lyon:

Q. What is the function of the cover cap 27 in the Wallace patent '787?

A. The function of the cover cap in Patent '787, Exhibit 1, is twofold. First, it allows the assembly of the spreader between the pins after the pins have been assembled together to form the plunger unit, and the cap holds the spreader onto the body so as not to permit its displacement as the plunger or pins are pressed in and out. Its second function is to provide a smooth work-engaging surface on the [92] outer end of the body, to engage the work sheets without scratching or marring them.

Q. In your last answer are you referring to this cup-shaped portion shown on Exhibit 16, and referred to as No. 27?      A. That is correct.

Q. Now, does that cup-shaped device coact in any way with the spring that actuates these devices? I believe it is numbered in this drawing—it is not numbered in this drawing, but I will just write "spring" 'on it in Exhibit 16.

A. Will you read the question to me, please?

(The last question was read by the reporter.)

A. Yes, it coacts with the spring to the extent

(Testimony of Harold W. Mattingly.)

that the entire assembly coacts with the spring, and the opening in the cap through which the pins project forms an abutment to prevent the spring from pulling the pins too far inwardly.

Q. The spring does not engage the cup-shaped member 27 or any loose member attached to that cup-shaped member 27?

A. No, in Patent '787 the spring engages the solid end wall at the outer end of the body.

Q. What is the number given in the patent to that solid end wall?

A. That is an integral end wall 12.

Q. I will add that number at this point, as indicating the solid end wall——

A. That is correct. [93]

Q. ——in Exhibit 16.

A. That would be 12.

Q. What is the function of that end wall 12?

A. It acts as an abutment for the spring and provides a rigid end wall to the body, and in the specific construction shown in that patent that end wall also provides material into which a slot may be cut for the purpose of receiving the cross bar or T-shaped spreader.

Q. You have testified, I believe, an advantage of the structure of Patent '787 over prior devices was that it was a cheaper device to assemble, did you not?

A. No, I compared the structure using the end cap 27 with structures which used only the solid integral end wall and which required the spreader

(Testimony of Harold W. Mattingly.)

to be inserted from the open inner end of the body, and in that connection I stated that the structures using this extra end cap 27 were easier to assemble.

Q. In other words, this structure is easier to assemble and cheaper, in your opinion, than one having only a solid end wall and no end cup?

A. That is correct.

Q. Would you explain how you arrived at such an opinion?

A. I can explain that best by referring to my drawings, Exhibits 20 and 22. In Exhibit 22 we are shown a structure there in which the body C has an integral end wall, with the [94] opening through which the pins are to project. In assembling that, since there is to be no cover cap, the spreader D must be inserted through the open rear end of the cap.

Q. Now, just a minute. Is that not true of the function of the device in '787, the pins have to come through from the solid end?

A. The pins have to come through from the open end, but the spreader does not have to come through from the open end. The spreader is applied after the pins have been projected through the opening in the end wall.

Q. Then the main difference between the two devices is the fact that with a solid end wall and no cap you must insert the spreader from the inside, while on the device with a solid end wall and a cap on it you may insert the spreader from the outside?



(Testimony of Harold W. Mattingly.)

A. I don't know whether that would be the main difference between them, but that is one difference which, in my opinion, makes a quicker and easier assembly.

Q. Are there any other differences?

A. Well, there are other differences, such as the fact that the end wall where a cap is to be used can be slotted, if it is desired, to hold the T-shaped spreader from rotating relative to the body.

Q. You could put a slot on the inside of the body, could you not, on a solid end? [95]

A. Oh, yes.

Q. So that there is no difference there?

A. The only difference would be in the assembly.

Q. Are there any other differences in the two devices, in the manner of assembly?

A. The devices with the end cap and without the end cap?

Q. Yes, that is all we are referring to.

A. Offhand I can't think of any important differences. As I pointed out, the chief difference appears to be the manner in which you can assemble that spreader with the pins.

Mr. F. W. Lyon: I wish to offer next in evidence as Defendant's next in order——

The Clerk: Exhibit D.

Mr. F. W. Lyon: Exhibit D, a set of parts in a sack, which it is stipulated constitute the parts of the defendant's device exemplified by Exhibit 11, and of which Exhibit 19 is a drawing.

Mr. Mason: I will so stipulate that they are,

(Testimony of Harold W. Mattingly.)

your Honor. From my inspection of them they appear to be, subject to any corrections I might find by a more careful examination.

The Clerk: Admitted, your Honor?

The Court: Yes. Which drawing, now, does that refer to?

Mr. F. W. Lyon: These are the parts that make up Exhibit 17 or the finished Exhibit 11. [96]

The Clerk: Defendant's Exhibit D.

Q. (By Mr. F. W. Lyon): Mr. Mattingly, I will hand you Defendant's Exhibit D, and ask you if that clamp can be assembled in any way you know, in which the spreader is pushed on the outside, slipped in from the outside, such as the manner in which the spreader 25 is slipped into Exhibit 16?

A. Why, yes, it can be assembled by inserting the spreader from the outside of the body.

Mr. F. W. Lyon: I offer in evidence next in number, I believe it is E, a sub-assembly from defendant's clamp, exemplified by Exhibits 11 and 17. I believe it is stipulated that this is such a sub-assembly?

Mr. Mason: I will stipulate that it appears to be.

The Clerk: Admitted, your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit E in evidence.

Q. (By Mr. F. W. Lyon): I will show you a sub-assembly, Exhibit E, and ask you what the difference is between that sub-assembly and Exhibit C.

(Testimony of Harold W. Mattingly.)

A. Exhibit E, as you pointed out, is a sub-assembly. Exhibit C is the complete assembly of a clamp with the pins, spreader, and all of the parts secured in place within the body. The primary difference between these two is that in Exhibit E this sub-assembly can be put together as a unit for insertion later into a body, whereas in Exhibit C it would be [97] impossible to make a sub-assembly of the parts and then insert them through the solid end wall of the body in Exhibit C.

Q. Will you compare the structure of these two and tell me what differences there are?

A. The sub-assembly E, as I pointed out, does not have any body, and it does not present the problem of inserting a spreader from within the body to a position between the extending ends of the pins. The sub-assembly, Exhibit E, has the spreader which is insertable through this small cap during the making of the sub-assembly, and then the sub-assembly is inserted in the body and the cap is used to hold the sub-assembly in place on the body. In other words, the sub-assembly that you have shown me here can be applied to a body which has either an open end wall on the body or a closed end wall—no, it can't be inserted on a closed end wall on the body. I beg your pardon.

Q. It could not be used to insert in the body illustrated in Exhibit 16 in Patent '787?

A. No. If you have a sub-assembly like this, it must be inserted into the body from what I have referred to as the outer end of the body, and that



(Testimony of Harold W. Mattingly.)

would require the outer end of the body to have a big hole in it.

Q. There is nothing in Patent '787 that teaches you can insert such a sub-assembly completed and finished into a body?

A. Not in Patent '787, no. [98]

Mr. F. W. Lyon: I have here a clamp that I ask be offered in evidence as Defendant's next in number. The only reason I am offering it is to illustrate the witness' testimony, and it is stipulated that this is an operating clamp.

The Clerk: Admitted, your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit F in evidence.

Q. (By Mr. F. W. Lyon): Now, I will show you Defendant's Exhibit F, and ask you to compare that with Defendant's Exhibit C.

A. Defendant's Exhibit F appears to be substantially identical with Exhibit C so far as the construction of the body, the pins, the spreader, and the assembly of the spreader and pins through a solid integral end wall on the body. There is some difference in the manner in which the inner ends of the pins are secured together.

Q. Now, will you compare this exhibit——

The Court: There is a difference in the jackets, isn't there?

The Witness: Oh, yes, there is a difference in the shapes of the bodies on these two, but the function and operation of the bodies are the same.

(Testimony of Harold W. Mattingly.)

Q. (By Mr. F. W. Lyon): That shape is not functional? A. No.

Q. It is merely that one device is a larger device than [99] the other?

A. And in the case of Exhibit C the shoulders for engagement with the operating tool are formed as a wide groove, for as in Exhibit F the shoulder is formed merely by a single extending flange.

Q. Now, will you compare Exhibit F with the sub-assembly, Exhibit E?

A. I make the same comparison that I did between the sub-assembly and Exhibit C, namely, that this sub-assembly, Exhibit E, could not be inserted in its assembled condition in the body of Exhibit F.

Q. Isn't it true that the only difference between C, E and F is that there is no flange on the black circular cup-shaped member of Exhibit E to engage a working tool? Otherwise functionally they are exactly the same device?

A. Yes, I think functionally they are the same.

Q. If you put a flange on this cup, an outwardly extending flange on Exhibit E, similar to the flange you referred to on Exhibit F, Exhibit E could be operated as a sheet fastener just as well as Exhibit F?

A. Not just as well. It would be of rather flimsy construction because of the material that is used in this cap, as compared with the heavier material which is used on the body of Exhibit F.

Q. What difference does that make in the operating function? [100]

(Testimony of Harold W. Mattingly.)

The Court: The material in these different clamps and gadgets is not in issue.

Q. (By Mr. F. W. Lyon): There are no functional differences there because you changed the material?

A. No, no. The sub-assembly, Exhibit E, could be used as a temporary clamp without any additional flange on it.

Q. By "temporary" you mean temporary in the sense you referred to with the temporary rivets or temporary fasteners, and not just——

A. As a makeshift?

Q. ——as a makeshift?

A. No, I used the expression "temporary" as I have used it in all of these assemblies we have talked about.

Q. Now, I will show you the parts that comprise Exhibit D, and ask you if you could make that sub-assembly without the same process you described in referring to Exhibit 22. A. Yes.

Q. You have to assemble both of them in the same way, do you not?

A. No, there is one primary difference, and that is that in Exhibit 22 you are attempting to insert the pins and the spreader into a rather long body.

Q. That is just a matter of the size of the body and not of the function of it, though? [101]

A. It is more than a matter of the size of the body when you are attempting to insert a set of pins and a spreader into a very small diameter opening in a fairly long body. Then you have difficulty in



(Testimony of Harold W. Mattingly.)

holding the parts in place while you are inserting them. In your sub-assembly, Exhibit E, the little cap that you have referred to as being like the body of Exhibit F is very shallow, so that all of the parts are open for you to grasp and to manipulate without having the difficulties of trying to manipulate something which is deep down in the hole in the body.

Q. Referring to Patent '787 will you show me where the body is described as being of any particular length, size or dimension, or where that is set forth in the Claim 11?

A. No, it isn't set forth in the claim and there are no dimensions given in the specifications of the patent. The construction which is illustrated in the drawings, however, does show an elongated body.

Q. But you will admit the sub-assembly, Exhibit E, is substantially as much a body as you have shown in Exhibit 22 or Exhibit 16?

A. No, I couldn't call that a body. It doesn't serve the function of a body. It wasn't intended to serve the function of the body of those other exhibits.

Q. The only difference between it and the body is there is no flange on it to grab the tool? [102]

A. And it isn't long in the sense that I have testified to here, which is the usual construction of the bodies on these clamps. [103]

Q. I refer you to Exhibit F, and would you say the same thing about that as your last statement?

The Witness: Well, would you read the preceding question and my answer?

(Testimony of Harold W. Mattingly.)

The Reporter: The other reporter just left the room, Mr. Mattingly, with both of them.

Q. (By Mr. F. W. Lyon): Well, would you state that that did not have an elongated body?

A. No; I would state that Exhibit F does have an elongated body. It has a sufficiently elongated body to present the problem that I have discussed here of making it difficult to get the pieces assembled through the hole in the end of the body, because you have to work in a fairly deep, small, bore of the body.

Q. Wouldn't you have that same difficulty in inserting that spreader from the inside of that cap in sub-assembly, Exhibit E, I believe it is, as you would in the Exhibit in your hand, Exhibit F?

A. No. The shallower your cap or body will be, the easier it will be to assemble those parts.

Q. Then it is merely a matter of degree as to the length of body?

A. Yes; it depends on the particular finished clamp that you are trying to assemble. If it has a long body with a deep hole in it, you have that problem that I have discussed [104] here, and if you have merely the shallow cap, such as is on Exhibit E, your problem is much less intricate.

Q. But, to make the sub-assembly, you still have to insert the spreader and the retaining pins on the inner side; you cannot put them on the outer side as taught in patent '787?

The Witness: I don't believe I understand that question. Would read it to me?

(Question read by the reporter.)

(Testimony of Harold W. Mattingly.)

Mr. F. W. Lyon: Well, I will make that question clearer. Strike it.

Q. You have made a chart here, Exhibit 20, I believe, as to how parts of Exhibit 16 of patent '787 are assembled. If I understand your testimony—and correct me if I am wrong—you put your retaining pins A through the body, the opening in the body C? A. That is correct.

Q. Then you slip the T-shaped spreader D between the ends of the retaining pins as they extend from the body? A. That is right.

Q. Then you slip the cap E over the end of the retaining pins, down over the spreader, and crimp the same in position and release it?

A. That is right, though you can release it prior to crimping. [105]

Q. Now, in a device made from the parts Exhibit D, which are exemplified in Exhibits 11 and 17, can you assemble that device by putting the retaining pins 20 in the body first and passing them through the end of the body?

A. If I understand your question correctly, I don't think that you could. The construction at the inner end of the body there, which includes those inter-engaging flanges on the body and the plunger 17, would make it impossible to assemble that clamp from its inner end.

Q. Principally because you would not have any way of holding it in position in the body; you could not apply the cap, the spreader, to this body because



(Testimony of Harold W. Mattingly.)

you could not hold the retaining pins in the body the way you hold them in in Exhibit 20?

Mr. Mason: Is that a question or a statement?

The Witness: I did not follow that. I am sorry. Would you read that to me?

(Question read by the reporter.)

A. I don't think that that is true. You could hold the pins in the body, that is, they would be in the body during the remaining steps in the assembly.

Q. They would just be loose in there?

A. That is right.

Q. The body would be a nuisance; you would have to make the sub-assembly first? [106]

A. That would be the logical way to do it; yes.

Q. And in making that sub-assembly, you have to assemble the entire device through the body or the cup, just as you have assembled it in Exhibit C, in the same direction?

A. You would have to make your assembly of your pins and spreader from the rearward end of the cup.

Q. And as you do in Exhibit 22 and Exhibit C?

A. The same as you would have to assemble those parts from the rear of the body in Exhibit 22.

Q. Then all that you do when you add the body to the sub-assembly to make the finished clamp is to put a protecting sheathe around it?

A. You could say that; yes. It is a heavy body which is adapted to operate and cooperate with the operating tool.

(Testimony of Harold W. Mattingly.)

Q. But the mode of assembly, other than crimping on the body, is identical with the mode of assembly of Exhibit 22?

A. Except for the fact that you are working with your sub-assembly with only a very shallow cup, and you do not have the difficulties that you would with the elongated body.

Mr. Mason: If your Honor please, I do not like to interrupt Mr. Lyon, but I made a stipulation here that that was a sub-assembly of part of Exhibit 11. Now, this line of cross-examination has been directed to forgetting that it is in a sub-assembly and forgetting the part of the clamp [10] that we are charging to infringe. I do not see the materiality of it. He may have something in mind, or we are wasting time. There may be many ways you could do that.

The Court: I think it was mostly by way of explanation, wasn't it, Mr. Lyon?

Mr. F. W. Lyon: That is right. I contend that we assemble this device the same as we assemble the other one there, and I think the witness has practically stated that.

The Court: Proceed.

Q. (By Mr. F. W. Lyon) Is it not true that the cup on that sub-assembly, Exhibit E, and the finished body which is referred to in Exhibit 17 as No. 5, constitute a two-piece body?

A. Yes; you can call it a two-piece body.

Q. There is no difference in putting those two

(Testimony of Harold W. Mattingly.)

parts together than there is in putting the bottom on an ordinary tin can?

The Witness: Would you read the question to me, please?

(Question read by the reporter.)

A. That is a fairly good statement of it; yes.

Q. Is there any functional difference in the enclosure structure of patent '787 from that in the patent '408, the two patents in suit?

The Witness: Would you read that to me?

The Court: We will recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Thursday, January 23, 1947.) [109]



Los Angeles, California, Thursday, January 23, 1947  
2:00 P.M.

(Case called by the clerk.)

HAROLD W. MATTINGLY

called as a witness by and on behalf of the plaintiffs herein, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. F. W. Lyon: I believe there is a pending question before the witness.

Cross-Examination  
(Continued)

(The question referred to was read.)

The Witness: Was that "enclosed?"

(The question referred to was reread.)

The Witness: I am afraid I don't understand your question, Mr. Lyon. The Patent '787 has an end closure comprising the cap 27. Patent '408 has an end closure comprising cap 11, and in the sense that both of those are used to provide a surface to engage the work surface, and they provide an inner surfaces that engages and holds the spreader from disassembly. The answer is the functions are the same.

Q. (By Mr. F. W. Lyon): By the end closure of Patent '787, you only mean the cup-shaped end 27?

A. That is what I have referred to here in my last answer, that that is the end closure. [110]

(Testimony of Harold W. Mattingly.)

Q. Is that what is meant in Patent '787 by the words "end closure"?

Mr. Mason: Are you referring to Claim 11 of the patent, or to the specifications?

Mr. F. W. Lyon: I am referring to the specifications at present.

The Witness: I don't find the words "end closure" in the specifications here of Patent '787, nor in the claim, Mr. Lyon.

Q. (By Mr. F. W. Lyon): All right. You interpreted the words "end closure" in the claim to mean certain parts of it are those parts, in Claim 11?

A. In Claim 11 the expression is "an end wall" rather than "an end closure," and that refers to cap 27 and does not apparently include the other structure there.

Q. Now, Claim 11 refers to "a cover cap" in Line 53. What is meant by that? What interpretation do you place upon those words in the claim?

A. Upon the words "cover cap"?

Q. Yes.

A. The cover cap is the cup-shaped cap 27 shown in the drawing of Patent '787.

Q. Are you familiar with the proceedings leading up to the grant of Patent '787, known as the file wrapper?

A. I have studied the file wrapper, yes. [111]

Q. Is there any interpretation in that file wrapper of the meaning of that language?

A. I don't believe that there is. My recollection

(Testimony of Harold W. Mattingly.)

of the file history or file wrapper is that the language of Claim 11 was inserted, and that claim was allowed without any rejection.

Q. As to that Claim 11, no references were ever cited against it? A. That is correct.

Q. Now, you have referred to a method of assembly of these devices and illustrated it in Exhibit 20. Can a device such as shown in Patent '408, Exhibit 19, be assembled in that manner?

A. In what manner? In the same manner as the assembly in Exhibit 20?

Q. Yes. A. No. In Exhibit—

Q. 19?

A. In Exhibit 19 the assembly in that instance would include what you would call a sub-assembly of the retaining pins. The washer, the spring, the washer 9 and the cap 11, with the spreader would be assembled as a separate unit, and then inserted into the body and thimble after the sub-assembly had been completely put together. [112]

Q. In other words, to assemble patent '408 you would have to go to the type of assembly you have in Exhibit 22? A. No.

Q. You would have to insert the pins and spreader into a cap or body member as all from the same side?

The Witness: Would you give me the previous question, please?

(Previous question read by the reporter.)

A. No.



(Testimony of Harold W. Mattingly.)

Q. Would you not have to insert the pins, the retaining pins, and the spreader through the same side of the cup-shaped body in assembling patent '408 as you would in making the assembly 22?

A. No. You would do just the opposite, that is, to assemble the structure shown in '408 you make your sub-assembly and then you insert——

Q. What I mean is how do you make the sub-assembly? That is what I mean. You have to make the sub-assembly just the way you do 22?

A. To make the sub-assembly you would insert the pins, the enlarged ends of the pins, through the washer 25, first; then you would insert the spreader——

Q. Is not 25 the spreader?

A. I beg your pardon. Washer 9, isn't it?

Q. Yes. [113]

A. You would insert them through the washer 9 and then you would insert the spreader laterally between the two pins, and then you would insert the enlarged heads of the pins through the cap 11. In 22, in Exhibit 22, your first step there is to insert the pins through the body, and then insert the spreader laterally, and then—I beg your pardon—22 is the structure without the cap. Your assembly would be entirely different, as I see it in——

Q. In Exhibit 22 is it possible to assemble the spreader and pins in one operation into the body?

A. Oh, yes. As a matter of fact that is the way it is illustrated there in 22. Your first step in 22, shown in Figure 2 of that drawing, shows how you

(Testimony of Harold W. Mattingly.)

put the spreader in between the two pins, and then while holding in that position you insert the spreader and the pins through the body, as shown in Figure 3 and Figure 4 of that drawing.

Q. According to you, you have to stagger your pins when going through the body?

A. It is preferable; and while it may not be absolutely necessary if the enlarged heads on the pins are not too big, you could probably get them through there where they are in alignment with each other

Q. Isn't your Exhibit 22 your idea? You have never seen a fastener assembled in that manner commercially; you merely figured that that is one way of doing it? [114]

A. That is the way that I saw one of that type of fastener assembled at the Monogram factory. And when you say "commercially", I——

Q. Well, that was one sample. There was no production going on at the time, of those fasteners?

A. No, not of that type of fastener; so I could only see the one assembly operation.

Q. In other words, they had no set-up at the time to commercially produce these fasteners of that type; it was just an experimental model, you might say, at the time you saw it?

A. It was not an experimental model. It was an old model that had been made up for commercial use, and we just took it apart and put it together again by the series of operations that they informed me had been the way they had assembled them.

(Testimony of Harold W. Mattingly.)

Q. Now, in patent '408 what is the function of what you call the washer 9?

A. The function of washer 9 is to act as an abutment for the end, that is, for the outer end of the spring, which is 32, I believe. The end of the spring bears against that washer which in turn acts as an abutment for the upper end or the cross-bar of the T-shaped spreader.

Q. The dish-shaped cup 11, other than locking the completed device in position, has no function in connection with the spring 32? [114-A]

A. It has no function with the spring 32, except to hold all of the parts together to prevent the spring from pushing the whole end out. In other words, that does not in itself act as an abutment for the spring.

Q. Exhibit 11, you have described the manner of assembling it here, in which you had to make a sub-assembly, Exhibit E, in which the spreader and the pins were inserted from the inside of the cup. In your opinion, is that the same operation as assembling over a washer, then inserting your spreader, and then fastening your cap on the end of that?

A. Essentially, yes.

Q. Would it be possible to make the assembly shown in '408 without washer 9?

A. Yes; it would. In fact, you have none of this sub-assembly you have here.

Q. Then the washer 9, in your opinion, has no function?

A. It does have a very definite function. It is



(Testimony of Harold W. Mattingly.)

possible to make an assembly without using that washer 9, but it is not, in my opinion, as satisfactory as if you used the washer 9. In the first place, the ends of the spring, of any helical spring, while they are manufactured purposely to present the end helix on the spring as nearly flat as possible, they are not always flat, and you can't depend upon the same amount of contact on both sides of the extending crosshead of [115] the T unless you use the washer in there and let the spring bear against the washer. I think the assembly which includes the washer is more satisfactory, though it is possible to make it without it.

Mr. F. W. Lyon: I think that is all.

### Redirect Examination

By Mr. Mason:

Q. Mr. Mattingly, could you make a sub-assembly such as defendant's Exhibit E and mount in on the body of Exhibit 11 without using the body and cap combination such as is used in Exhibit 11 or the drawing of that exhibit, Exhibit 17?

A. No; you could not. The structure shown in Exhibit 17, as I pointed out, includes the body portion in which the upper end has—the inner end, as we have referred to it here, has the inter-turned flange to engage that thimble; so that it is essential that the assembly of the spring, pin, cap, and spreader be made in that body from the outer end of the body, and you would have to have your body

(Testimony of Harold W. Mattingly.)

capable of allowing all of that assembly to pass inwardly from the bottom end and then your cap to secure that assembly to the body.

Q. Could you use a sub-assembly, Exhibit E, and apply it in Exhibit 10?

A. No. If you formed your sub-assembly, you could not [115-A] get it into Exhibit 10 for the reason that your sub-assembly would have the T-shaped spreader disposed between the enlarged heads of the pins, and you could not then get the enlarged heads of the pins and the spreader through the opening in the solid end wall of the body used on Exhibit 10.

Q. In order to apply Exhibit E to Exhibit 10, it would be necessary to force this entire upper part of the assembly through the hole in the end wall of the body, wouldn't it, and then subsequently crimp the cap on the body in some way?

A. Yes.

Q. You have pointed to an end wall 12 in the specific embodiment of the invention illustrated in one of the figures of the drawing of patent '787. Do you find in claim 11 that that end wall, as distinguished from a cap, is made an element of the claim?

A. No; there is no element in the claim corresponding to that end wall.

Q. As to claims 1 and 2 of patent '408, do you find any end wall made an element of the patent claim, in addition to a cap? A. No.

Q. Now, do you find in Exhibit 11 any counter-

(Testimony of Harold W. Mattingly.)

part for the wall which is designated as wall 12 in drawing Exhibit 16?

A. The washer which I have indicated as 9 in Exhibit 17 could be said to perform the same function as the end wall [116] 12 in patent '408, in the sense that it acts as an abutment for the spring on the one side and acts as an abutment for the cross-bar on the T on the other side. [117]

Q. Now, in your cross-examination you made the statement that Exhibits C, E and F are functionally the same. I believe the statement was something to that effect. Now, is Exhibit E a complete and functional clamp?

A. Not in my opinion. It is not a complete clamp. It is a sub-assembly which is intended and designed to be used with additional parts in the making of a complete clamp.

Q. In other words, Exhibit E, as there, is not an operative clamp?

A. No, you would have to do some other things to that sub-assembly in order to make it into an operative clamp.

Q. So that before they would be functionally the same, that is, to the extent that they would both clamp something, you would have to complete Exhibit E?      A. That is correct.

Q. By mounting it on a body, such as the body in Exhibit 11?      A. That is right.

Q. I believe you also answered the question, which was asked you, if the operation of the placing of the cap on the body was something like placing a



(Testimony of Harold W. Mattingly.)

cover on a can. Are those two operations of the same character?

A. No. Securing the actual crimping of the cap on the end of the hollow body can be likened to putting the end on a can in the sense you crimp one about the other, but the [118] assembly of a body and cap, with the sub-assembly of pins, and so forth, would be considerably different than merely putting an end on a can.

Q. Now in all of these drawings, Exhibits 16, 17, 18 and 19, there is a leg of the spreader 25 which projects outwardly through the end cap and outwardly even beyond the ends of the retaining pins when the pins are fully retracted. What is the purpose of that, if you know?

A. Unless the center leg of the T-shaped spreader extends a considerable distance beyond the end cap and, in fact, it should extend far enough to substantially penetrate all the way through the aligned holes in the sheets of material with which the clamps are to be used, so as to hold the enlarged ends of the spreader in their spread condition, even though they have been spread far enough to go through the sheets of material—if the leg of the spreader does not extend that far, then the only thing that holds the enlarged heads far enough apart to engage the edges of the holes in the sheets is the resilience or elasticity of the pins themselves, and they may spring together or toward each other sufficiently to release the sheets and let the clamp inadvertently fall out.

(Testimony of Harold W. Mattingly.)

Q. In other words, the thickness of the pins above the heads, plus the thickness of the spreader should be substantially the diameter of the hole through the sheets which are being held? [119]

A. That is correct. And that fixed space or diameter should be carried far enough away from the end of the cap to completely or substantially completely fill the longitudinal extent of the holes in the sheet. Otherwise, you are only depending on the spring of the pins to hold your sheets together.

Q. That is all?

A. I should say the resilience of the pins to hold the sheets together.

Mr. Mason: That is all.

Mr. F. W. Lyon: I have just one or two more questions of this witness.

#### Recross-Examination

By Mr. F. W. Lyon:

Q. Mr. Mattingly, you state the safety type cap, such as Patent '408, could only be assembled through the lower end?

A. As shown in the patent, yes.

Q. You couldn't make the assembly in any other way?

A. Not if you are using the structure shown in the patent. There is a possibility of your making an assembly—you might be able to make an assembly from the other end by not forming the flange 16 at the inner end of the body until after the assembly

(Testimony of Harold W. Mattingly.)

had been made, and then attempt to swedge that inner end of the body inwardly to form the retaining flange. [120]

Q. You could form a safety cap the same way then as you illustrate in Figure 22 by merely crimping over the end, and lock the cap in place after the assembly?

A. Would you read that question to me, please?

(The question was read.)

A. There is no safety cap shown in Exhibit 22, Mr. Lyon, and there is no crimping operation which is performed in Exhibit 22.

Mr. Mason: Were you referring to 17 or 19?

Mr. F. W. Lyon: No.

Q. (By Mr. F. W. Lyon): I hand you a clamp and ask you if you know how that could be assembled. A. It is a little——

Q. It is a safety cap.

A. This clamp appears to have a body formed with an integral end wall so that the assembly of your spring, your retaining pins, and your spreader, that much of it, would probably have to be assembled along the lines I have indicated in Exhibit 22, and after you had completed that assembly, then——

Q. Let us mark the neck of that with a red pencil.

(Counsel did as indicated.)

A. The sleeve, which I have indicated in Exhibit 22 at F, could be assembled on the pins and that



(Testimony of Harold W. Mattingly.)

sleeve could have a radially extending flange such as 33, although from this model [121] I can't tell whether it does or not, and then the extreme outer end, or, the extreme inner end of the body which you have indicated in red could then be swedged over or rolled over to hold the sleeve F in place.

Q. That would be one way of manufacturing a locked-in cap? A. Yes.

Mr. F. W. Lyon: May I offer the clamp just referred to as defendant's next number?

The Court: In evidence.

Mr. Mason: I object to it as being immaterial. There might be many ways in which you could make a clamp. This is encumbering the record.

Mr. F. W. Lyon: It is just to illustrate his testimony.

The Court: It just illustrates Mr. Mattingly's testimony.

The Clerk: It will be Defendant's Exhibit G in evidence.

Q. (By Mr. F. W. Lyon): In Plaintiffs' Exhibit 11 and the chart 17 is the pressure of the spring 32 directly on the end cover 11?

A. In Exhibit 17?

Q. Yes.

A. The force exerted by that spring is directed onto the cover 11, yes.

Q. Is the force of the spring in Exhibit 16 exerted on the end cover cap 27? [122]

A. No.

Q. Now, then, as I understand, you state that

(Testimony of Harold W. Mattingly.)

the crimping of an end on a tin can is functionally different than crimping of a cap 25 on the body of the patent in suit?

A. If I understand what you mean by the word "functionally," I would say yes. It is different in the sense that while the actual crimping of the cap on the body can be likened to the putting of an end on a tin can, there is a difference in the type of connection that is made between them. On a tin can you have your side walls of your can and your cover, and the material has to be spread out and rolled upon itself to form your function between your can, that is, your can cover and your can top and your body. In the constructions we have been talking about here, your cap is formed with an extending skirt, I believe it is referred to in the patent, which goes up around the body and the body is formed with an annular groove and your crimping is formed by merely shoving the crimping into the groove. Your assembly of a sub-assembly such as——

Q. I didn't ask any question about the sub-assembly. I asked you as to the fastening on of the cap.

A. If you mean by "functionally" that the cap is finally secured to the body, the answer is yes.

Mr. F. W. Lyon: I think that is all. [123]

#### Redirect Examination

By Mr. Mason:

Q. Does it make any difference, Mr. Mattingly, in the functions of this clamp whether the spring

(Testimony of Harold W. Mattingly.)

in the clamp exerts its pressure on an end wall, such as 12 in Exhibit 16, or whether it exerts it on a washer such as Wb in Figure 11 or Figure 12—I mean in Exhibit 11 or 12, or those drawing Exhibits, Exhibits 17 or 18?

A. Will you read the question, please?

(The question was read.)

A. No, the only function to be performed is to provide something against which that end of the spring may bear and push to exert its force, to draw the pins into the body.

Mr. Mason: That is all.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Mason: Now, I was going to recall Mr. Livingston to just ask him one question, but Mr. Lyon says he is willing to stipulate. I want to establish that the price of the old Cleco clamp at the time that Monogram came out with these Wallace clamps was 20 cents or over, each. Do you so stipulate?

Mr. F. W. Lyon: Yes, I will stipulate they were sold for 20 or more cents apiece in 1940.

Mr. Mason: In 1941, the early part of 1941?

Mr. F. W. Lyon: Well, up to April, 1941, I can stipulate.

Mr. Mason: That is all right.

Now, in my stipulation with relation to Exhibit E, I stipulated that was the same as a part of the sub-assembly of Exhibit 11. On more careful in-



spection there seems to be one of the washers, namely, a washer corresponding to Wa in Exhibit 17, that has been omitted from this sub-assembly. Now, Exhibit 11 and Exhibit 17 are the stipulated structures. May it be deemed that there should be another washer in Exhibit E?

Mr. F. W. Lyon: I would just like to ask Mr. Mattingly one question. Then I will.

The Court: All right.

### HAROLD W. MATTINGLY

recalled as a witness on behalf of the plaintiff herein, having been previously duly sworn, was examined and testified as follows:

#### Recross-Examination

(Continued)

By Mr. F. W. Lyon:

Q. The answers you have made, Mr. Mattingly, with reference to the sub-assembly E, would they be changed if there was another washer positioned in here above the cross arm of the T?

A. I don't think that the answers to the questions of which you have asked me about the sub-assembly E, or that Mr. [125] Mason has asked me, would be changed, whether there was a washer there or not.

Q. In other words, your evidence is that whether the washer is above or below, or whether there are two washers, there is the same difference?

(Testimony of Harold W. Mattingly.)

A. Yes. The answers I made did not depend upon the presence or absence of a washer in that position.

Mr. F. W. Lyon: That is all.

The Court: That is all.

(Witness excused.)

Mr. Mason: That concludes the plaintiff's direct case, your Honor.

Mr. F. W. Lyon: Now, your Honor, before making an opening statement in this case, I would like to offer in evidence a book of exhibits including the patents in suit and the prior art set up. I have a copy here for your Honor, and I will ask that this book be marked exhibit in number.

The Clerk: That will be Defendant's Exhibit H in evidence.

Mr. Mason: May I ask if those are the patents named in the answer, Mr. Lyon:

Mr. F. W. Lyon: Yes. I am going to offer each one individually, but I am offering the book as a whole, subject to any exceptions you may wish to take.

The Court: What does the book contain, generally? [126]

Mr. F. W. Lyon: It contains the prior art, the two patents in suit, and two prior Wallace patents, which I wish to offer in evidence.

The Court: The prior art, the patents in suit, and two prior Wallace patents?

Mr. F. W. Lyon: Yes. It is a bound book, for your Honor's convenience.

Now, as Exhibit H-1 I will offer the Wallace patent in suit bound in this book, No. 2,365,787.

The Court: Will you give the number again?

Mr. F. W. Lyon: 2,365,787.

The Court: All right.

Mr. F. W. Lyon: As Exhibit H-2, the patent in suit, Wallace No. 2,364,408.

Mr. Mason: May I ask why you are placing in evidence the patents in suit, when they are already in?

Mr. F. W. Lyon: I am just putting this whole book in.

The Court: It is just a matter of convenience, counsel.

Mr. F. W. Lyon: The next one as Exhibit H-3 is the British patent to the A. T. S. Company, Limited, 413,403. [127]

The Court: 413,403, a very small number.

Mr. F. W. Lyon: That is right. It is a British patent, your Honor, of February, 1934.

The Court: February 13?

Mr. F. W. Lyon: February, 1934.

The Court: All right.

Mr. F. W. Lyon: As H-4, the British Patent to Rocroy, 443,683, of July, 1935.

As H-5, United States Letters Patent to Blanc, No. 2,136,875, issued in November, 1938.

As H-6, United States Letters Patent to DeMooy, 2,159,655, issued May, 1939.

As H-7, United States Letters Patent to DeMooy,



2,269,188, issued on January 6, 1942, the application for which was filed on March 15, 1940.

As H-8, Patent to Webb, 2,256,634, issued September 23, 1941. The application for this patent was filed on March 22, 1941.

The Court: That is to Webb?

Mr. F. W. Lyon: To Webb. H-9 is United States Letters Patent to Rogers of March 17, 1942. The application thereon was filed April 18, 1941. That is patent 2,276,344.

As H-10, the patent to Wallace, 2,271,879, issued February 3, 1942, and the application thereon was filed November 4, 1941. [128]

As H-11, patent to Wallace, 2,266,929, issued December 23, 1941, and the application was filed August 23, 1941.

Mr. Mason: May I ask if you are offering H-5, the Blanc patent, merely to show the state of the art and not as anticipatory?

Mr. F. W. Lyon: H-5, the Blanc patent——

The Court: When was the application filed on the patent to Wallace, December 23, 1941?

Mr. F. W. Lyon: ——which patent number is that?

Mr. Mason: That is Blanc.

Mr. F. W. Lyon: That is number what?

Mr. Mason: 2,136,875. I do not believe that is set up in the answer. If you are offering it for any purpose except to show the state of the art, I am objecting to it.

The Court: What number, again, Mr. Mason?

Mr. Mason: That is H-5, patent No. 2,136,875 to Blanc.

The Court: That is right; H-5.

Mr. Mason: I think that is the one that covers the old Cleco patent, if I remember.

Mr. F. W. Lyon: That is set up, your Honor, in the answers to the interrogatories, and the patent is intended to be relied upon.

Mr. Mason: I do not believe it is named in the answer, is it?

Mr. F. W. Lyon: No; it is not named in the answer. [129]

Mr. Mason: I object to that upon the ground of improper notice, if it is offered for anticipatory purposes. The law is, your Honor, that you have to give 30 days' notice.

The Court: Oh, yes.

Mr. F. W. Lyon: That is a matter for argument, your Honor. But, first, they have already referred to it and placed in evidence—the plaintiff has—the direct evidence that this device was on sale and in public use, themselves.

The Court: Yes. From that standpoint it would be satisfactory, but would it be satisfactory notice that you were going to rely upon it for the purposes of this action?

Mr. F. W. Lyon: And, as Exhibit 3-C, they introduced this patent in evidence. So they cannot now assert that they had no knowledge of it.

The Court: They are not asserting that. It is a

question as to whether or not you were going to rely upon it. That is the whole point.

Mr. F. W. Lyon: Well, I intend to.

The Court: Is it your contention, then, Mr. Lyon, that by placing it in the situation here they have waived their right to the 30 days' notice?

Mr. F. W. Lyon: That is one contention; and the other one is that under the New Rules notice is no longer required. If there is a question by the court, I will brief that issue for you. [130]

The Court: I believe, unless prejudice is shown and it would require some preparation for trial on that particular patent, and there does not seem to be in the record, that I will overrule the objection of the plaintiffs. Proceed.

Mr. Mason: As I say, I won't take up time, your Honor. I do not think it is material, anyway. But, for the purpose of the record, I wanted to offer an objection to it.

The Court: All right.

\* \* \* \* \*

I would like to call Mr. John Hackstaff.

### JOHN D. HACKSTAFF

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: John D. Hackstaff, H-a-c-k-s-t-a-f-f.

Mr. F. W. Lyon: I understand that Mr. Mason is willing to stipulate to the qualifications of the witness as an expert.



(Testimony of John D. Hackstaff.)

The Court: We will take the afternoon recess.

Mr. Mason: As a patent expert, I will stipulate.

(Short recess.) [140]

The Court: Proceed.

### Direct Examination

By Mr. F. W. Lyon:

Q. Did you give your name and address?

A. 1661 South Oxford Avenue, Los Angeles 6, California.

Q. Mr. Hackstaff, will you state your qualifications as a practicing engineer?

A. I graduated from Stephens Institute of Technology in 1898 with a degree of mechanical engineer, and have practiced that profession continuously ever since. Subsequent to leaving college I was employed by the Rockwell Engineering Company of New York, who built furnaces for manufacturing purposes, for every conceivable object, from singing cotton cloth to making cartridges for the Army and 16-inch cannon for the Navy. I spent quite a lot of time up in the brass rolling companies and brass cutting up companies in the Naugatuck Valley. I became familiar at that time with the practices in such shops.

In 1906, with some associates I formed the Hope Engineering Company of Pittsburgh, Pennsylvania, who were contracting and consulting engineers, and contractors, in the natural gas business. In connec-

(Testimony of John D. Hackstaff.)

tion with this work I built pipe lines and gas distribution systems throughout the United States.

In 1912 I came to Los Angeles for the J. G. White Corporation, to rehabilitate the Midway gas line from Taft to [141] Los Angeles, and spent three years introducing natural gas to the city of Los Angeles.

I then went back to Oklahoma and Texas, where, from 1916 until 1922, I was the vice-president and general manager of the Empire Pipeline Company, one of the major pipeline companies of the United States.

In 1922 I came to Los Angeles as a consulting engineer, and have practiced that profession here ever since. In 1926 I was employed by the City of Los Angeles for a year and a half in cases before the Railroad Commission, which materially arose in connection with the serving of straight natural gas to the city instead of mixed gas, which had previously been employed. Since 1925 I have served as a consulting engineer on technical problems in patent litigation. In the course of this consulting work I have examined hundreds of patents. I have analyzed their specifications, their drawings, and their claims. I have compared the specifications and disclosures of the patents with different devices, both as to whether they were similar or whether they were dissimilar. Among the clients for whom I have done this service and been retained are the Standard Oil Company of California, the General Electric Company, the Westinghouse Company, the

(Testimony of John D. Hackstaff.)

Natural Tube Company, the Distillate Corporation, and many others.

Q. Are you familiar with the use of machine tools?

A. By observation of them in actual practice years ago, [142] and by what has been disclosed in the patents which I have examined.

Q. Are you familiar with the use of jigs and dies, and so forth?      A. In general, yes.

Mr. F. W. Lyon: Any cross-examination as to his qualifications?

Mr. Mason: What, if any, experience have you had in the manufacturing and assembly of sheet metal clamps, Mr. Hackstaff?

The Witness: None, Mr. Mason.

Mr. Mason: That is all.

Q. (By Mr. F. W. Lyon): Have you read and analyzed the disclosures of the patents in suit?

A. I have.

Q. And the various patents introduced here in evidence as Exhibit H?

A. I have examined and analyzed the disclosures of the patents in evidence, including the A. T. S. Patent 413,403, the Rocroy Patent 443,683, the Blanc Patent 2,136,875, the DeMooy Patent 2,159,655, which I will henceforth call the first DeMooy Patent, and the DeMooy Patent 2,269,188, which I shall refer to as the second DeMooy patent, and the Webb patent 2,256,634.

Q. You have also examined the Wallace patents, Exhibits H-10 and H-11?      A. Yes.



(Testimony of John D. Hackstaff.)

Q. As evidenced by these patents, Exhibits H-1 to H-11, will you state the condition of the sheet metal temporary rivet art from 1935 to the date of the patents in suit?

A. The situation in regard to the sheet metal art, as disclosed in the patents in suit, as it existed in 1935, is set forth in full by the patent of Blanc, H-5, in which he says:

“Heretofore, it has been found in practice that before plates or the like could be riveted together, it was necessary for the workman to first secure the plates together by screws or bolts, which were inserted in the holes provided to receive the rivets. This long and expensive operation was necessary not only to secure the plates together but also to assure a perfect coaxial alignment of the rivet holes. In a great number of cases, this operation necessitated two workmen, one on one side of the work for inserting and holding the bolt in place, and the other on the other side of the work for screwing and tightening the nut on the bolt. It is therefore an object of this invention to produce a plate securing and locating device which is applied to or removed from the work from only one side thereof, thus eliminating the assistance of another workman from the [144] opposite side of the work.”

That was the condition in 1935.

Q. Now, will you describe in chronological order the condition of this art from that date on?

(Testimony of John D. Hackstaff.)

A. In 1934 the A. T. S. Company received a patent from Great Britain, No. 413,403.

The Court: That is Exhibit H-3?

The Witness: H-3. This he called an improved clip for holding sheet metal together, and he faced exactly the same problem that Blanc faced when he made his French application about contemporaneously.

The A. T. S. Company, as shown in simplest fashion on Figure 6 of that drawing, shows that he had a body which rested against the plate to be fastened together. Attached to this body was a mandrel——

Q. (By Mr. F. W. Lyon): Would you refer to the number given in Figure 6 of that part?

A. This body or housing, as he called it, the body or housing is element 36 in Figure 6. Slidable in this housing he had a retaining pin or sleeve, which he numbered 38, 39 and 41, which was composed of a number of flexible fingers at its lower end.

I will say here that in discussing these patents that they all used different nomenclature. They called the same things by different names, and they used the same name for [145] different things. So that they use the words “inner end” and “outer end” in an ambiguous fashion. From now on, in talking about these clamps I shall always refer to the part of the clamp which sets against the work to be performed as the bottom of the clamp. The top—the part of the clamp which is away from the work is the top of the clamp.

The A. T. S. patent shows a set of fingers which

(Testimony of John D. Hackstaff.)

protrude through a hole in the bottom of the clamp, which have enlarged ends of pins.

The Court: I believe you referred to A. T. C. I thought it was A. T. S.

The Witness: A. T. S. I beg your pardon.

Attached to the body or housing of the clamp is a mandrel, which also projects out forward of the body, beyond the body, through the hole in the center of the body between the pins. It is a characteristic of this mandrel or spreader or enlarger that it does not have any movement, longitudinal movement relative to the body. The pins which slide actually with the body have this characteristic: When they are protruded some distance out beyond the body, they can enter the rivet hole. At this place the ends of the pins are not in contact with the spreader. When the pins are withdrawn back into the body so that they are nearer the end and coact with the spreader, they then will not pass back through the hole in the body. They act then somewhat like a barbed fish spear. There is a spring which is positioned so that it presses downward against the body and presses upward against the head of the pins. This combination in the A. T. S. patent he calls the spring 40, and he calls the mandrel 34.

Q. By "mandrel" you mean either spreader, mandrel, or anything synonymous?

A. Yes, sir. He calls it a mandrel.

Q. What are the basic elements of a fastener, as disclosed by this A. T. S. patent?



(Testimony of John D. Hackstaff.)

A. A body which rests on the sheets with a retaining pin which is longitudinally movable through the body and projects out beyond the bottom of the body; a spreader, which is attached in some way to the body, which allows the pins to be brought coaxially together to pass through the hole when they are projected some distance below the mandrel, but which slides down so they cannot be retracted through the hole when they are brought up with the mandrel near the body; and a spring which acts between the body and the head of the pin, tending always to retract the pin into the body.

Q. One of the specific features taught by this patent is that the combined diameter of the retaining pins and the spreader or mandrel must be substantially the same as the diameter of the riveting holes into which it is to be inserted; is that not true?

A. The pins have an enlargement on their lower end. [147] The combined diameter of the mandrel and the pins above the enlargement, before they are enlarged, fill the rivet hole. The combination of these four elements, the housing, the retaining pins, the spreader and the spring are a true mechanical combination. I shall refer to the housing in the future as the housing element A, the retaining pins as the element B, the spreader as the element C, and the spring, retracting spring, as the element D. The four, working together, form a true mechanical combination, and the A. T. S. people were allowed by the British a claim on this simple mechanical combination, which is Claim 1 of the patent, and which

(Testimony of John D. Hackstaff.)

reads, "A device for the purpose described comprising essentially a body, a stem of two or more members which stem is adapted to pass through holes in the sheet metal structure so that its end remote from the body protrudes from the structure and comprising also means operable from the body to expand and contract the protruding end of the stem and to draw one or more of the stem members forcibly upward to the body."

Q. After the A. T. S. patent, what was the next step in the art?

A. A year later Rocroy obtained a British patent, 443,683, for the same purpose. Rocroy's device had the four elements that the A. T. S. had, with the exception that instead of using a spring to retract his retaining pin, he threaded the upper end of the pin and used a nut, screw nut, so he had to screw the nut. The action, however, of the combination, if you will assume that the nut and its thread are for the purpose of retracting the spring, or, the equivalent of retracting the pin and are equivalent to the spring for performing the same function, it is identical.

Q. Just one moment before you go forward. Mr. Hackstaff, did not the A. T. S. patent also teach that you could use either a spring or a nut and bolt or various other mechanism for securing the tension?

A. Yes. In the A. T. S. patent Figure 3 shows a device where he uses a screw thread and nut to retract his mandrel, and he has other similar devices,

(Testimony of John D. Hackstaff.)

but they all work on the same principal of retaining pins, which, when they are projected out beyond the end of his body, will pass through the hole, but when they are withdrawn by any means whatever to a predetermined distance from the body, where they coact with his spreader, they won't pass through. That is the essential feature of the patent.

Q. Now, will you point out in detail what is shown in the Rocroy patent?

A. Rocroy formed his retaining pin—Rocroy, in the first place, had his body, which he called a sleeve.

Q. What is the number?

A. 13. He calls his retaining pin a rod, which he numbers 1, 2, 3 and 4. This rod is screw-threaded at its [149] upper end and it is split at its lower end into two bifurcated pins. Each of these pins has at its bottom, at its outward end, heads or barbs. Rocroy makes his spreader in the shape of a T. He places the cross arm of the T somehow in the end of his body. Either he drops it in or drops it into a slot. The drawings are quite ambiguous as to exactly what shape it is in there, but he says he attaches it to the body, and it is perfectly plain from the drawing, from the shape of the T in the end of the body. The cross arm of the T is in the body. The stem of the T projects outwardly down from the body, and is positioned between the two halves of the two retaining pins, so that when the clamp is in use the area of the two retaining pins, plus the area of the T, fill up the rivet hole, and when the pin has been retracted so that it is spread by the



(Testimony of John D. Hackstaff.)

rivet, the heads of the barbs or pins will not go through the rivet hole.

Q. Have you finished with the Rocroy patent?

A. I think so.

Q. What was the next step in the art?

A. The next step chronologically in the art is the patent to Blanc, 2,136,875, which was applied for in France on May 13, 1935, and issued in the United States on November 15, 1938. This patent discloses a body which he calls a cap or a jaw, 15 and 16. He has a retaining pin, 10, 11, 12 and 14. He has a spreader and washer, 18 and 20, and he has a [150] spring 13. The body consists of a cup-shaped body, which he describes as follows:

“Slidably mounted on the pin 10, there is a cap or jaw 15 provided with an enlarged counterbore 16 centrally disposed therein and with an eccentric bore 17 of a diameter substantially equal to the normal diameter of the pin 10.”

In this case Blanc reverses the operation. He says that his body slides on the pin, while his predecessor says the pin slides inside the body. It is immaterial, because one slides by the other.

The Court: The motion is the same, whichever you call it?

The Witness: The motion is the same. If you look at the drawings of Blanc, in all of them you will see that what he calls his caps or jaw 13 is a cup-shaped body, exactly similar to the bodies of most of the clamps in evidence here, and exactly

(Testimony of John D. Hackstaff.)

similar to that shown in the patent in suit. It has a barrel circumference, and it has a bottom or end wall which is attached to and is an integral part in operation of the barrel.

Referring to the pin, he says, "10 represents a pin or elongated element which has the upper end thereof threaded to receive a head 11. The head 11 is provided with an annular recess 12 adapted to receive one end of a compression spring [151] 13 which surrounds the pin. The other end of the pin is pointed as at 14 for facilitating the insertion of the pin through the work.

"As previously stated, the pin 10 is made of cylindrical stock the cross section of which defines a circle mark 'A' in Fig. 6. For a portion of its length between the ends thereof, the pin 10 is eccentrically turned down or otherwise machined to form a reduced portion 22 slidable through the bore 17 of the cap 15. The cross section of this reduced portion of the pin is shaped as indicated by 'B' in Fig. 6. The forward end of the reduced portion of the pin produces with the normal forward portion of a bevelled shoulder 23 which is capable of engagement with the work as will be explained later."

He has a spreader. In counterbore 16, that is of his body, there is located in engagement with the bottom wall thereof a washer 18 having a radially disposed slot 19 extending somewhat beyond the

(Testimony of John D. Hackstaff.)

center of the washer and the width substantially equal to the normal diameter of the pin. The washer 18 is also formed with stem 20 depending therefrom and extending through the bore 17 of the cap 15. This washer with the depending stem is functionally the equivalent of Rocroy's T-shaped spreader.

As seen by Figure 6, when in operation the area of the stem added to the area of the cut-down section of the pin is equal to the diameter of the rivet hole, so it fills it solid just exactly as shown by Rocroy and as shown by [153] A. T. & S. He also has a spring which functions at all times to tend to retract the retaining pin back into the housing.

The upper abutment of this spring is the head of the pin; the lower abutment is upon the washer which sits upon the end wall of the housing. Blanc shows that his spreader or his clamp is to be used with an applying tool, and he indicates roughly, diagrammatically, such an applying tool. The applying tool, in principle, is the same as the guns that I have seen placed in evidence here.

Q. Those guns have nothing to do with the invention?      A. Have nothing to do.

Q. The alleged invention?

A. They are simply specially formed pliers, and the action of the plier in every case when it is applied to the clamp is to squeeze the spring and thus force the retaining pin out through the bottom hole of the housing. To do this they have got to push upward. Since these guns act or are applied to a



(Testimony of John D. Hackstaff.)

flange or handle on the housing and on the top of the head of the pin, the only way that the force of the plier can be attached to the spring is down through the side walls of the housing and upward through its bottom which is attached to the side walls. If the bottom was not attached to the side walls, why, there would be no effect whatever; it would not work. [154]

Blanc uses the A-B-C-D-combination of a mechanical element, the A-B-C-D-element mechanical combination that was employed by Rocroy and the A.T.S. If you will analyze Blanc's claims, it is evident that he does not in any way, shape or form claim to be the inventor of this combination. All his claims are specifically limited to the type of rod he uses and its enlargement and the protruding finger.

Q. In other words, Blanc contributed, if anything, to the art one small detail?

A. He contributed specifically a specific design of a spreader and retaining pin, and he only claimed that.

Q. What is the next step in the art, Mr. Hackstaff?

A. In 1937, DeMooy made application which materialized in patent 2,159,655, issued on May 23, 1939. A comparison of the DeMooy and Blanc drawings shows that they are almost identical. You might look upon them almost as variations of one inventor in the same patent application.

DeMooy has a housing 10 which is exactly similar

(Testimony of John D. Hackstaff.)

in form and function to Blanc's housing 15 and 16. He has a spreader 20 which is a stem projecting downward from the housing. He has a retaining pin 20, 21, 22, and 23 which is identical with Blanc's, with the exception that he keeps it full size all the way and bends the end. He shows a different type of head to the pin. He shows the head of the pin being always inside the barrel, while Blanc puts it there as a kind [155] of a cap outside. That is immaterial because they actually function exactly the same way.

DeMooy shows that his spreader, through looking at the drawing, is cast or formed integrally with the bottom of the housing, as contrasted with Blanc's finger, which is attached to a washer and dropped into the housing and held down with a spring.

DeMooy uses exactly the same A-B-C-D-combination as the predecessors; and an examination of his claims shows that he also thinks that his invention consists solely in the form of the pin, because each one of his claims states:

“a pin of uniform diameter \* \* \* having an end portion bent to an obtuse angle”.

He shows, in Figure 5, that the area of the pin and the spreader when it is in the hole is approximately equivalent to the area of the hole so as to hold the plates in alignment.

Q. What is the next step in the art, Mr. Hackstaff?

A. On March 15, 1940, DeMooy applied for his

(Testimony of John D. Hackstaff.)

second patent, which was issued on January 6, 1942, as patent 2,269,188.

Mr. F. W. Lyon: Just a minute, Mr. Hackstaff. I do not know whether your Honor is familiar with the Davis-Bournonville case. As you will note, this last patent, which would be after the first patent in suit, but was filed [156] more than one year prior to the patent in suit, and to show that that is evidence of a prior invention, I refer your Honor to the case of Alexander Milburn Co. v. Davis-Bournonville Co., 270 U. S. 390, wherein a prior applied for, but subsequently issued, patent is prior art and evidence of prior invention.

Mr. Mason: That is so conceded, your Honor, that the patent speaks from its filing date as to invention, and not prior publication.

Mr. F. W. Lyon: I just wanted to put that in now so there will be no question concerning this patent.

All right, Mr. Hackstaff.

A. This patent also employs the now conventional A-B-C-D-combination. It has a body 10, a retaining pin 20, 21, 22 and 23, a spreader 15, and a spring 25. The body pin is a short cup-shaped housing with a solid integral end or bottom having a hole through the center.

His retaining pin consists of:

“a retainer 20 which is formed of a piece of wire bent substantially as a hair pin with the free ends thereof each provided with a pointed



(Testimony of John D. Hackstaff.)

head 21 and forming an outwardly inclined lateral projection 22 engagable with the underside of the work as will be hereinafter explained. Each leg 23 of the retainer 20 extends through the bore 13, one on each side of the spreader [157] or vertical partition 15 with the tail portion 17 thereof located between the legs 23 of the retainer 20.” [158]

This describes exactly the same construction that was illustrated in the Rocroy patent of 1934. The spreader 15, which is T-shaped, like Rocroy, has a longitudinally extending central or tail portion 17 extending beyond the lower end of the base of the housing 10 and capable of insertion into the aligned perforations of the sheets.

The pin has a head against which the spring 25 presses upward. The distinguishing feature of De-Mooy is that he positions his T-shaped spreader in a slot on the outer bottom face of his body.

He says, referring to the drawing:

“10 represents a cup-shaped housing formed at its upper end with an external annular flange 11, and having its lower end formed by a cross wall or base 12 having a cylindrical bore 13 extending centrally therethrough. The base 12 is provided with a laterally extending groove 14 passing through the center of the bore 13, within which groove is mounted a relatively thin spreader or vertical partition 15 which is secured therein by any suitable means such as

(Testimony of John D. Hackstaff.)

by partly closing the outer ends of the groove  
14 as at 16.”

This merely says that in order to attach his spreader and fix it so that it will not move longitudinally with the body, the DeMooy cuts a slot on the bottom of his body, [159] inserts the crosshead of the T in it and peens down the edges of the slot. This is a construction practically similar to that which can be seen in the Rocroy drawings.

Q. How does that construction differ from the patent in suit '787, if any?

A. Exactly the same, with the exception of his method of holding the spreader in the slot.

Q. Is there any mechanical difference from clamping the slot closed over the top of the T and in putting the cover cap over that slot?

A. They both perform exactly the same function, as far as that is concerned; and their purpose is to hold the T in the slot. The main difference between——

Q. Could the clamp shown in the DeMooy, the second DeMooy patent, be assembled in identically the same manner as illustrated in Exhibit 20?

A. It would be a little easier, because you would not have to insert any cap over it. All you would have to do would be to insert the pins through the relatively short housing, by some fixture compress the spring so as to project the pins a distance beyond the bottom of the housing, slip the T in between the two legs of the pins in the slot, remove

(Testimony of John D. Hackstaff.)

the pressure on the spring, and then after, at your leisure, peen in the head of the slot.

Q. Now, you have referred here to a T-shaped spreader. [160] I will have you look back to the patent to A. T. S. Company, in Figure 6, and ask you if that is not a T-shaped spreader?

A. 34 on Figure 6 has a mandrel which was inserted into a head, the cross section of which is a T.

Q. Could that spreader be inserted from the bottom, from the outside of the bottom of the barrel?

A. No. It would have to be inserted in through the top of the barrel. If it had been assembled, the drawing shows that the mandrel, as indicated right opposite the end of the line 35, as if the mandrel was screwed into the crosshead. In assembly it might have been that it would be, therefore, possible as a last step to screw the stem of the mandrel 34 into its head.

Q. I call your attention to the threads at the top end of that mandrel 34, and ask you if you took into consideration the fact that that is threaded in when you made your answer that it could not be inserted from the outside?

A. No. If you cut your T or your mandrel in two parts, then you can assemble the mandrel. Functionally, it is immaterial whether the mandrel and this head be in one piece or in two pieces; it is purely a matter of convenience in fabrication.

Q. But he does show it so that it could be assembled from the outside of the bottom?

A. Yes, sir; that is, he can assemble the stem



(Testimony of John D. Hackstaff.)

from [161] the outside of the bottom, but not the crossbar.

Q. Now, will you compare the elements described in the second DeMooy patent and the elements described in the specification of the first patent in suit '787?

The Court: You will not be able to conclude with this witness tonight?

Mr. F. W. Lyon: No, sir.

The Court: Recess until ten o'clock tomorrow morning.

(Whereupon, a recess was had until 10:00 o'clock a.m., Friday, January 24, 1947.) [162]

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Los Angeles, California,  
Friday, January 24, 1947, 10:00 A.M.

The Court: Mr. Cross will call the calendar.

(Case called by the clerk.)

The Court: Both sides are ready?

Mr. F. W. Lyon: Yes, your Honor.

Mr. Mason: Ready, your Honor.

The Court: Proceed.

Mr. F. W. Lyon: Take the stand, Mr. Hackstaff.

JOHN D. HACKSTAFF

called as a witness on behalf of the defendant herein, having been previously duly sworn, resumed the stand and testified further as follows:

(Testimony of John D. Hackstaff.)

Direct Examination

(Continued.)

By Mr. F. W. Lyon:

Q. Mr. Hackstaff, I believe you were preparing to compare the disclosure shown in the second De Mooy patent with the disclosure of the first patent in suit, '787?

Mr. Mason: I think he made that comparison.

Mr. F. W. Lyon: No, that was the last question before we recessed.

The Witness: The De Mooy patent, 2,269,188 and the Wallace patent, 2,365,787, are in the same art. They are for devices for exactly the same purpose. Each of these devices employs the basic mechanical combination first claimed in [164] evidence by the A. T. S. Company. The four-element combination, consists of a housing; a retaining pin which is slidably mounted in the housing and projecting through a hole in the bottom of the housing; a spreader attached to the housing; and a compression spring. The devices illustrated in the De Mooy drawings and the Wallace drawings are practically identical, with one minor difference.

A comparison of the Figure 4 of the De Mooy drawing, when placed alongside of Figure 5 in the Wallace drawing, will illustrate how closely they resemble each other. The De Mooy drawing shows that he has a housing which he calls 10, which has a cross wall or base 12, a hole in the center of the base 13, a groove in the outer face of this base 14, and

(Testimony of John D. Hackstaff.)

an outer flange 11. The Wallace body or housing, as illustrated in Figure 5, has a body pin, with an interior bore 11, an integral end wall 12, and a hole in its center 15, a slot in its outer surface 16. The devices shown in the two drawings are exactly the same. The De Mooy patent has a retaining pin——

The Court: Now, there are two De Mooy patents.

The Witness: This is De Mooy Patent '188, the second De Mooy patent.

The Court: I understand.

The Witness: He has a retaining pin or retainer 20, which has two bifurcated legs, 21 and 23, with barbs at their outer points where they project through the hole in the base [165] of the housing 22, and a head inside or above the bottom of the housing 24.

The Wallace patent in Figure 5, which is similar to all the other figures, discloses a split clamping pin 19, with bifurcated legs 22 and 22a, barbs at their points 80 and 80a, and a pin head or plunger at its upper end, 23 and 20.

Both patents have spreaders. The spreaders in both cases are T-shaped. De Mooy says that his T-shaped spreader has a cross arm 15, which he positions in a groove 14 on the outer face of the bottom, and that he has a leg 17 projecting downward and outward from the bottom of the body and positioned between the two bifurcated legs 23.

The Wallace T-shaped spreader has also a cross-bar 25 which is located in the slot 16 cut on the inside face of the bottom housing. It has a spreader.



(Testimony of John D. Hackstaff.)

That spreader has a leg 25a which is partitioned between the pins 22. The two spreaders in the two patents are exactly the same in shape. They are positioned in exactly the same place in their respective assemblies. They perform exactly the same functions in both assemblies and are identical in all respects.

Each of these patents has the fourth element in the combination, the spring. The DeMooy shows a spring 25 acting between the pin-head 44 and the bottom or end wall of the housing 12. Wallace shows a spring 34 acting between the pin-head 20 and 23 and the bottom wall 12. Thus far the two patent drawings and specifications are identical. They differ only in the feature as to how in the two devices their respective spreaders are to be retained in the slots. DeMooy says that you put the cross-bar of the spreader in the slot and then you crimp down the edges of the slot over the spreader. Wallace says that he applies a cap over the outside face of the bottom so as to hold the spreader in the cap.

Wallace's cap performs an additional function. The bottom wall or end wall of the previous devices, such as Blanc and the first DeMooy, were smooth except for a hole in the center and, therefore, not liable to mar up the sheets, soft sheets, against which they were pressed. Both DeMooy [167] and Wallace cut slots in this engaging face which would be liable to deface the work. DeMooy does nothing to obviate this difficulty. The cap of Wallace pro-

(Testimony of John D. Hackstaff.)

vides a work-engaging surface, smooth work-engaging surface, which DeMooy does not possess.

With the exception of the means of retaining the spreader in the slot, and Wallace's provision of a smooth outside working surface, the two disclosures are identical in form and function and their modes of operation.

Q. The DeMooy, as described in the second DeMooy patent, and the Wallace fastener from the patent '787 are assembled in identically the same manner?

A. Since they are identical in essential form and arrangement of parts, any assembly which was possible in the Wallace patent is also possible in the DeMooy patent; and anything which was impossible in the Wallace patent is also impossible in the DeMooy patent, and vice versa.

Q. What is the main function or functions of the spreader in these devices?

A. The spreader in these devices has two functions. This is described by Rocroy in his patent 443,683.

The Court: I do not have that one.

Mr. F. W. Lyon: It is in the book, your Honor.

The Court: Oh, all right.

Mr. F. W. Lyon: I assembled all the patents we referred [168] to in this case in that one book for your assistance.

The Court: All right; proceed.

A. Where he says, beginning——

The Court: Now, where are you?

(Testimony of John D. Hackstaff.)

The Witness: On Rocroy.

Mr. F. W. Lyon: What line?

The Witness: Page 1, line 52.

The Court: All right.

A. "Between the arms 4 and 5, there is fitted into the slot 3 a slide 11 of inverted T-shape of which the cross piece or base 12 is secured to a sleeve 13"——

Q. (By Mr. F. W. Lyon): He means by "sleeve" there what we have been calling body or housing?      A. Yes.

"capable of sliding on the screwed rod, its movement towards the head 6 spreading apart the arms 4 and 5 consequently, when the tool is in the condition shown in Figs. 3 and 4, causing the shoulders 7 to engage with the outer surface of the sheet 10 thus acting as a bolt-head. The rivet hole 8 is filled exactly and no play is left."

It is plainly shown in Figures 3 and 4, to which this description refers, that one of the features of the T-shaped spreader in the Rocroy device was to completely fill the rivet hole, acting in connection with this operation with the two [169] bifurcated legs of the pin. This filling of the rivet hole is rather an important feature in any bolting-up device, because, if the rivet hole is not filled completely by the clamp when it is in operation, there is a possibility that the two sheets can shift laterally; and Rocroy saw this and provided for it.



(Testimony of John D. Hackstaff.)

Q. In every one of these patents you have referred to in your testimony and in both the patents in suit, this feature of a spreader and a retaining pin to fill the hole is present; is that not true?

The Witness: Will you read that, please?

(Question read by the reporter.)

A. Yes.

Q. I believe on the drawings of certain of these patents you have colored the drawings so as to show the elements that you have referred to. Would you refer to those drawings and tell us which color applies to which element, naming the patent, first, that the drawing is from?

Mr. Mason: Hadn't you better identify those?

The Court: Mark them for identification so that we may have a reference to them.

Mr. F. W. Lyon: All right. I will offer the following three drawings from the following patents as Defendant's next in order: These are the patent to Blanc, 2,136,875——

The Clerk: That will be Defendant's Exhibit I for [170] identification.

Mr. F. W. Lyon: I ask that they be offered into evidence, only to illustrate the witness' testimony so that we do not have to come back.

Mr. Mason: No objection.

The Court: There is only one Blanc?

Mr. F. W. Lyon: Yes, sir.

The Court: All right. That is "I," Mr. Cross?

The Clerk: Yes, your Honor; I in evidence.

(Testimony of John D. Hackstaff.)

The Court: All right.

Mr. F. W. Lyon: And the patent to DeMooy, which, for your Honor's reference, is the second one, 2,269,188, as Defendant's next.

The Clerk: Defendant's Exhibit J in evidence.

Mr. F. W. Lyon: And the patent to Wallace, 2,365,787, as Defendant's next.

The Clerk: Defendant's Exhibit K in evidence.

The Court: Now, wait a minute. There are several Wallace patents.

Mr. F. W. Lyon: This is the first one in suit, '787.

The Court: Oh, yes. "K," Mr. Cross?

The Clerk: Yes, your Honor.

The Court: All right.

Q. (By Mr. F. W. Lyon): I give you Defendant's Exhibit I and ask you what is illustrated by the various colors you [171] have placed on there and what you intend to mean by them?

A. I have on Exhibit I——

The Court: Go ahead.

A. I have colored the cup-shaped housing with its end wall in green. I have colored the retaining pin with its barbed outer end and its head top end red. [172]

I have colored the spreader and the washer to which it is attached yellow. I have not colored in this drawing the spring.

Q. Would you color that spring blue?

A. Blue.

(Testimony of John D. Hackstaff.)

Q. Are those the four essential elements that you have been testifying to?

A. Those are the four essential elements of the basic A, B, C and D combination, of which I have testified.

Q. Now, will you use Defendant's Exhibit J and explain the coloring on that drawing?

A. I have used the same colors for the same respective elements on Exhibit J, which is the De-Mooy Patent 2,269,188. The housing and its bottom is blue.

Q. It is green, isn't it?

A. It is green. The retaining pin with its head is yellow. The spreader is yellow and the spring is blue.

Q. Now, I will give you the Defendant's Exhibit K, and before you go any further on that, would you illustrate to the court what part of those drawings is pertinent to this case? I believe there are certain parts that are not at all pertinent and we can dispense with them.

A. Not pertinent to this case are all the parts which are included in the applying tool or gun.

Q. Those are left uncolored in all the drawings?

A. Are left uncolored in all the drawings. If you [173] desire, I can cross them out.

Mr. F. W. Lyon: No. I think your Honor can see that the only pertinent parts to this litigation are the parts that he has colored here, and I think it will be stipulated that the gun and the rest of those drawings have no pertinency.



(Testimony of John D. Hackstaff.)

The Court: It has been stipulated many times. Mr. Mason said the gun had no part in the issues here, except to illustrate it. Is that right?

Mr. Mason: That is right, your Honor.

Mr. F. W. Lyon: I just wanted the record to show.

The Witness: I have colored the housing, the cup-shaped wall, this end wall, green. I have colored the bifurcated retaining pin with its barbed lower end and its head red. I have colored the spreader situated in the slots in the face of the housing, the bottom of the housing, yellow.

I have also on this drawing colored the end cover cap 27, which is snapped on at the very bottom of the housing, to act as a retaining member for the spreader, holding the spreader in the slots of the housing and also to act as a smooth engaging surface, brown.

Q. (By Mr. F. W. Lyon): Now, have you examined the devices manufactured by the defendant charged to infringe? A. Yes, sir.

Q. Are you familiar with them?

A. I think so. [174]

Q. I hand you a chart——

The Court: Let us first have it marked for identification.

The Clerk: Defendant's Exhibit L for identification.

Q. (By Mr. F. W. Lyon): I will ask you if that chart was made under your supervision.

A. It was.

(Testimony of John D. Hackstaff.)

The Court: What does it represent?

Q. (By Mr. F. W. Lyon): What does that chart represent?

A. This chart represents in cross section the devices which are in evidence here as Exhibits 11 and 12.

Q. The defendant's fastener? A. Yes.

Q. Now, I notice that you have colored that chart. Would you explain the coloring there and compare it with the coloring on these other three exhibits?

A. In these charts I have colored the housing with its integral end wall green. I have colored the retaining pin which goes out through a hole in the center bottom of the housing with its engaging barbs and top red. I have colored the T-shaped spreader which is inserted inside of the housing above the bottom of the housing yellow. And I have colored the spring, which presses down and abuts at the lower end against the housing bottom and its upper end against the head of the retaining pin, blue.

Q. I think you are in slight error there. The lower [175] end of the spring engages the top of the T, does it not?

A. The lower end of the spring rests on top of the T, which is setting loosely in the bottom, so that the T simply acts as a washer to transmit the force of the spring to the bottom. The T itself has no power outside of the fact that it rests upon the bottom, withstanding the force of the spring. The spring really holds the T down against the bottom.

(Testimony of John D. Hackstaff.)

Q. Now, I notice you have stippled in red a part here. What is that?

A. These are the sheets. This is supposed to represent the sheets with which the tool is employed. There are three sections which in some manner would represent two overlapping skins and the rib member to which they are attached.

Q. They are not a part of this device?

A. They are not a part of the invention. They are exactly the same as the sheets that are illustrated in the De Mooy patent——

The Court: Just turn that over. It has a number.

The Witness: ——De Mooy patent, Exhibit J. In Figures 5, 6 and 7 it shows the device in use.

Q. (By Mr. F. W. Lyon): In these exhibits, I, J, K and L the same color represents the same part?

A. Yes, sir.

Mr. F. W. Lyon: I offer in evidence Defendant's Exhibit L. [176]

The Court: Admitted.

The Clerk: L in evidence.

Q. (By Mr. F. W. Lyon): Would you compare the body of the first patent in suit '787 and the body of either Exhibit 11 or Exhibit 12, Defendant's devices?

A. The body of Patent '787—what is the number of the exhibit?

The Court: H-1?

Mr. F. W. Lyon: Yes, H-1.

The Witness: ——H-1 is identical with the body of the defendant's devices as shown on Exhibits——



(Testimony of John D. Hackstaff.)

Q. (By Mr. F. W. Lyon): 11 and 12?

A. —11 and 12, and as shown on this drawing which has just been introduced, with this exception, that the patent shows the bottom end wall, 12, of the patent, as being made in one piece with the barrel of the body.

In the defendant's devices, as shown in this drawing, the body is made in two parts which are rigidly attached one to the other, so that to all intents and purposes when the two bodies taken by themselves are compared, they are the same.

There is no difference in a Royal Baking Powder can, between the can body and the top. The can body is made out of the sheet of metal, which is rolled into a cylinder and with a bottom attached to it permanently. The top of the Royal Baking Powder can is pressed out of a solid piece of metal in [177] a punch press and is all in one piece, but they are the same structure.

Q. Now, then, the body of the patent in suit '787 is a one-piece construction?

A. Is a one-piece construction.

Q. The body of the defendant's clamp, shown in Exhibit 11, is a two-piece device?

A. Is a two-piece structure, formed together so that there is no motion between them. They become integral in operation.

Q. Now, the patent in suit '787 has a cap 27 on the outer end of the body. Is there any comparable part on the defendant's structure exemplified by Exhibit 11?

(Testimony of John D. Hackstaff.)

A. Exhibit 11 has no cap of any kind that is comparable with the cover cap 27.

The Court: As shown on Exhibit No.—

Mr. F. W. Lyon: As shown on Exhibit 16.

The Court: On Exhibit 16, that is right.

Mr. F. W. Lyon: That is the same number as in the patent, your Honor.

Q. (By Mr. F. W. Lyon): The outer end of the defendant's device finishes the body?

A. The outer end of the defendant's device is the bottom of the body.

Q. And the cover cap on the patent in suit, has it any [178] purpose that is not present in the defendant's clamp?

A. The defendant's clamp has no slots on the outer end of the body. The patent in suit has slots on the outer end of the body, in which to insert the cross arm of the spreader. In this respect it is exactly the same as De Mooy's. The cap of the patent has, besides holding the slot, the spreader in the slot, which furnishes a smooth bottom surface by which the clamp can engage the work.

Since the defendant's device has no slots, it does not require any such superficial element to obviate the roughness for sharp corners of the slots.

Q. Would you compare the defendant's device, as exemplified by Exhibit 11 or 12, with the patent of Rocroy, Exhibit H-5, I believe it is—H-4.

The Court: H-5 is the Blanc patent.

Mr. F. W. Lyon: H-4.

The Court: H-4 is the Rocroy.

(Testimony of John D. Hackstaff.)

The Witness: Both devices have an outer body. The bottom end of the body rests upon the top of the sheet. Both devices have within them a slidable retaining pin, which at its lower end is in the form of two bifurcated pins which have barbs on their lower ends, and which have a head or some feature on their upper ends by which the retracting element can be attached. In the Rocroy device this is a screw thread on the pin. In the defendant's device this is an enlarged [179] head on the top end of the pin. Both devices have T-shaped spreaders which are positioned inside the body on its lower end.

In both devices the shank of the T projects down below the bottom of the body, so that it can be inserted into the rivet hole.

Q. One minute. As to the head of the cross arm of the T of either Rocroy or defendant's device, is that positioned outside of the body?

A. No, sir. That is of the cross arm of the T?

Q. That is right.

A. The T in both cases is positioned athwart the retaining pin so that it fits into the slot between the two bifurcated pins. In both cases the area of the spreader and the area of the retaining pin, the normal area of the retaining pin, completely fills the rivet hole. In both cases when the pin is retracted toward the head, in Rocroy by means of the nut which coacts between the body and the screw thread on the rod and in the defendant's device by the spring which coacts between the bottom of the



(Testimony of John D. Hackstaff.)

body and the head of the retaining pin, the pins are expanded so that they cannot be retracted through the rivet hole. The only difference between the two devices is in the method of retraction and of the rod.

Q. How many pieces does the body or sleeve, as Rocroy calls it, have? [180]

A. Seemingly one.

Q. And how many pieces does defendant's body have?

A. One. When it is finished, it is one piece. It is made up of two pieces which are joined together. The body itself is one. It is made up of a bottom, which is spun onto a cylindrical barrel in fabrication. After it is fabricated, it is the same thing and always operates as a single piece.

Q. In other words, the defendant's body, instead of being made in one piece, is made in two pieces, and comes out the same identical body as shown in the Rocroy device?

A. Yes. It is also—— [181]

Q. Now, will you turn to the patent to Webb, 2,256,634, Defendant's Exhibit—I believe it is H-8—and describe to us what is illustrated in that patent?

A. The patent to Webb, 2,256,634——

Mr. F. W. Lyon: One minute. For your Honor's information, this patent is only used as anticipation to the second Wallace patent in suit, has nothing to do with the first one as it is not early enough to anticipate the first patent.

A. The device illustrated in the drawings and specifications of the Webb patent is for exactly the

(Testimony of John D. Hackstaff.)

same purpose as Rocroy, Blanc, and the first De Mooy devices, for those illustrated in all the Wallace patents, and in the devices manufactured by both the plaintiff and the defendant in evidence in this case. Webb calls his device a "basting clamp." In Webb's device he has the identical A-B-C-D primary combination first claimed by the A. T. S., a housing and retaining——

Q. What is the number of the housing?

A. The housing which he calls a body 11, a retaining pin, composing which he has a cap 16, a cotter-pin 12, and legs 22 providing a bifurcated retaining pin. He has spreading means composed of a ring 24 and lugs 32; and he has a spring 29.

The form of Webb's spreader and the method in which it operates to spread the pins is quite different from that of [182] any of the other references or constructions. It is one variation of the basic elements C and D—the retaining pin and the spreader.

The operation, however, of the four elements is exactly the same as in all of the patents.

In addition to the four-element combination, he provides an additional feature. In the operation of the DeMooy patent 2,269,188, as is illustrated in Figure 1, the only thing that retains the tension on the spring before the device is used, and as illustrated in Figure 7, when the device is being used, is the engagement of the barbs of the retaining pin, either on the bottom of the housing, in the first instance, or on the sides around the rivet hole, in the

(Testimony of John D. Hackstaff.)

second instance. If for any reason these barbs should be sheared off or the pins broken, the retention of the compression on the spring would be released and the spring would be able to shoot the retaining pin to eject it out from the housing.

In order to provide against such a contingency Webb proposed a certain locking or stop. He provides an inward-looking flange or lip on the top end in his housing. This lip is 15 in the drawings. He provides that the head of his retaining pin which slips inside of these lips shall have an outward-looking flange within the barrel of the housing below the lips, so that if in use or at any time the holding action of the barbs of the pin was destroyed or was lost, [183] this outward-looking—the engagement of these two elements, the flange 20 on the head of the pin and the lip 15 on the top end of the housing, would prevent the ejection of the retaining pins from the housing.

Q. What, if anything, has Webb added to the state of the art?

A. Webb added to the state of the art this additional safety stop.

Q. He used the original four basic elements?

A. He used the original four basic elements.

Q. And added a safety flange?

A. A safety flange, which does not come into operation in the operation of the device unless something happens to the device which is not expected to happen.



(Testimony of John D. Hackstaff.)

Q. Now, will you compare the Webb disclosures, Exhibit H-8, with the disclosure of the second Wallace patent in suit, the '408 patent, Exhibit H-2?

A. The second Wallace patent, 2,236,408, Exhibit H-2, embodies the main four-element basic combination of all the prior patents and of the art. In addition to that, this patent discloses at the top of the head of his pin and coacting and moving with it, what he calls a thimble 17 which has a shoulder on the lower end 33. This thimble he provides on his housing, an inwardly-looking flange at its top 16. If for any reason the barbed head of the pins failed to [184] restrain the expansive force of the spring, the bringing up of the shoulder 33 on the top of the head of the pin or thimble, coacting against the shoulder 16, would prevent the ejection of the pin and its head from out of the barrel.

Q. Would you while you are making the comparison point out the parts in the Webb patent, if you have comparable parts, at the same time?

A. A comparison of the drawings of the Webb patent, Exhibit H-8, with those of the Wallace patent, Exhibit H-2, shows that both have thimbles or heads surrounding the top portion of their pin. Wallace's thimble is 17; Webb's thimble is 16. Both of these members extend out beyond the top end of the housing. Wallace has an inwardly-looking flange at the top of his housing 16; Webb has inwardly-looking lips 15, both in the same place for the same purpose.

(Testimony of John D. Hackstaff.)

Wallace, on the bottom end of his thimble, has an outwardly-looking lip 33. Webb has an outwardly-looking lip 20, both in the same location, on the top of their pin, both for the same purpose. One is identical with the other, practically, in form and function—practically, in form, and identically, in function.

Q. Now I will ask you to take the second claim of the Wallace patent in suit '408, Exhibit H-2, and will you take the elements, element by element, and show what part of the patent in suit is represented by that element and whether [185] or not you find that identical part and its number in the Webb patent?

A. As stated before, the form of the Webb retaining pin and the form of the Webb spreader is quite different from all of the other clamps either shown in the patents or in the art.

Webb's elements, however, perform exactly the same function that those of Wallace do, though not quite in the same way.

Q. Then, as I understand your testimony, the difference between the Webb patent and the claims of the patent '408 in suit is merely a matter of nomenclature?

A. No; not of the claim—of the operation of the device.

Q. The operation of the devices is the same?

A. Basically.

I will now answer your question in which you asked me to take the claim, element by element.

(Testimony of John D. Hackstaff.)

The Wallace patent '408 discloses a clamp with a safety stop added. The claim reads:

“a cylindric body”——

This is shown in Webb by his body 11.

“an end cap mounted on the body in position closing the outer end thereof”——

Webb has an end cap illustrated in gasket 28.

“said cap presenting an opening therethrough, and a work-engaging outer surface, a plunger reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,”——

This is the plunger 12, preferably made in the form of a cotter-pin, page 2, line 3.

“a spreader member having a laterally projecting inner end portion disposed in the cap”——

Webb does not have such a member.

“and an outer end portion projecting outwardly through said opening in engagement with the work-engaging member,”——

Webb does not have such a member.

“an inwardly disposed flange on the inner surface of the body adjacent its inner end,”——

Webb has such a member, his lips 15.

“a coil spring in the body around and retractively engaging the plunger”——



(Testimony of John D. Hackstaff.)

Webb has such a spring in exactly the same position, doing the same thing, spring 29.

“and tool-operated means for protracting the plunger against the pressure of said spring comprising”——

Webb has such tool-operating means. They are his head of his cap 16, which he calls, line 44: [187]

“A cylindrical cap 16 slidably fits within the upper end portion of the wall of the cylinder 13. This cap 16 has a side wall 17 and an upper end wall 18 providing a cylindrical recess 19. The outer surface of the wall 17 is formed with a downward facing annular shoulder 19a intermediate of its ends and an upwardly facing shoulder 20 near its lower end. As the cap 16 is reciprocally moved within the cylinder 13, the lips 15 serve as a stop to limit downward movement of the cap 16 upon engagement with the shoulder 19a and to limit upward movement of the cap 16 upon engagement with the shoulder 20.”

This tool-operating means is for protracting the plunger against the pressure of said spring. The claim further reads:

“a plunger-engaging member”——  
which is the plunger 16.

“reciprocally mounted in and projecting from the inner end of the body for manual engagement,”——

(Testimony of John D. Hackstaff.)

This is graphically shown on drawings 1, 2, and 4 of the Webb patent.

“said member having a relatively increased diameter inner end portion engagable against said flange when the plunger is in fully retracted position.”

This refers to the flange 20 of the Webb tool-operating means. [188] As far as the tool-operating means and the stop are concerned, the patent reads specifically upon the Webb disclosure. As far as the means and elements employed for spreading the pins, and the spreader, it does not read upon the Webb disclosure but does read specifically upon the disclosures that are illustrated in patent 2,266,929, Exhibit H-11.

Q. Mr. Hackstaff, comparing patent '408, Exhibit H-2, with the Webb patent you find everything that is in that claim in the Webb patent other than the shape of the spreader?

A. The shape of the spreader.

Q. Now, the shape and positioning of that spreader is old; is that not true? A. Yes, sir.

Q. And the shape and the positioning of the spreader in the '408 patent is the same shape and position as that in the Rocroy and DeMooy patents, the second DeMooy patent?

A. The shape and position of the spreader in the patent '408 is identical with the shape and position of the spreader in the DeMooy patent, with this exception: In the DeMooy patent, like in the

(Testimony of John D. Hackstaff.)

Wallace patent '787, the spreader is inserted into grooves cut on the outer face of the end wall of the housing. In the patent '408 the end wall of the housing 9 is a plain disc which has been crimped into and made an integral part of the housing, and has no slots. The cross-arm of the spreader there is positioned in a space [189] below the bottom of the housing, which space is included between the bottom of the housing 9 and a dished cover cap 11 which is positioned and attached to the body below the bottom of the housing.

The patent '787 specifically provides that the spreader is held against rotation. The patent '408 specifically provides that the spreader is rotatably positioned in the space.

Q. Now, Mr. Hackstaff, would you compare the structure as far as the end cap and spreader are concerned of the Wallace patent 2,266,929 with the Wallace patent '408?

For your Honor's information, this Wallace patent, Exhibit H-11, was issued more than one year before the patent in suit '408.

The Court: Issued December 23, 1941, I have.

Mr. F. W. Lyon: And is therefore prior art.

The Court: And the application was filed August 23, 1941.

Mr. F. W. Lyon: That is right.

The Court: That is H-11. We will take our morning recess.

(Short recess.) [190]



(Testimony of John D. Hackstaff.)

Mr. F. W. Lyon: I had put a question to the witness to compare, your Honor, the lower end structure of the Wallace patent, Exhibit H-11—that is this portion of that patent (indicating)—with the Wallace Patent '408 in suit, Exhibit H-2, and I believe that Mr. Mason is willing to concede that there is no difference in these two patents except that the '929 patent does not have any method of locking in this thimble 17.

Mr. Mason: I will stipulate that the cap and spreader assembly of Patent '929 is equivalent to the cap and spreader structure shown in——

The Court: Patent '408?

Mr. Mason: ——'408. Yes, your Honor.

The Court: In '408 the application was filed on April 9, 1943, and the patent was issued December 5, 1944, and in '929 the application was filed August 31, 1941, and on December 23, 1941, the patent was issued.

Mr. F. W. Lyon: Well, as to the prior art itself, there is no question on that.

Mr. Mason: There is no question on that: It is our position that this patent is an invention which produces a new and added result.

Q. (By Mr. F. W. Lyon): Mr. Hackstaff, the patent in suit '408, Exhibit H-2, is merely a combination of the Wallace patent, Exhibit H-11, the '929 patent, and the Webb patent, [191] Exhibit H-8, is it not?

A. It is the clamping structure of '929 patent added to the safety stop of the Webb structure, yes, sir. It is one plus the other.

(Testimony of John D. Hackstaff.)

Q. There is no mechanical difference between the Exhibit H-11, the Wallace '929 patent, and the '408 patent in suit other than the factor of peening the thimble into the body?

A. There is no difference whatsoever between the '929 patent and the '408 patent, with the exception that in the '408 patent they have added a feature which does not in any way, shape or form affect the device unless the device fails.

Q. Now, will you describe what is shown in the Rogers patent, Exhibit H-9?

A. The Rogers patent, 2,276,344, application April 18, 1941, is for what Rogers calls a connector. It is for a device for exactly the same purpose as all of the clamps which have been discussed in this case, both as illustrated by the patents and by the actual exhibits. It has the four basic elements of the housing, the slidable retaining member going through a hole in the bottom of the housing, a spreading member attached in some manner to the housing,—

Q. Give the numbers of these parts, please.

A. It has a housing which he calls a case 13 provided with a cover 16 having apertures 17 formed therein for the [192] reception of the segmental setting members 12. That is on Page 1, Line 10.

He has a retaining pin, which he describes as follows in Line 45:

“The bolt member 3 is split longitudinally from its lower end to allow for expansion and

(Testimony of John D. Hackstaff.)

provided with an enlarged head 8 having shoulders 9 adapted to engage the surface of the plate 7 surrounding the aperture 5. The bolt member is provided at its other end with a flange 10 adapted to engage a spring 11.”

He provides a spring element 11.

In the second column, Line 7:

“Between the flange 10 and base 14 is inserted a spring 11 tending to draw the head 8 within the case 13. At its upper portion the case 13 is provided with a cover 16 having apertures 17 formed therein for the reception of the segmental setting members 12.”

These segmental members 12 are the upward projections of the top of the retaining pin, and in the Rogers device are the tool-engaging means, as best illustrated on Figure 3. Rogers’ device has a spreader. Reading in Line 15:

“The cover 16 is also centrally provided with an inwardly extending pin 19 inserted into the axial passage in the bolt member 3.”

This device has the four elements of the basic combination: [193] a housing, a slidable retaining pin with enlarged heads projected down through a hole in the bottom of the housing, a spreader to spread the pins when they are retracted toward the housing so that they will engage the perimeter of the rivet hole, and a spring between the bottom of the housing and the top of the retaining pin, tending to withdraw the pin back into the housing. [194]



(Testimony of John D. Hackstaff.)

It also has a cover 16 in the housing which performs two functions: One, it carries and positions the spreader 19; and, second, it prevents the ejection of the retaining pin which is below it from the housing in case the barbs on the retaining pin fail, for some reason, to engage either the under surface of the work and also the under surface of the housing bottom.

It has the exact safety feature as shown by Webb, though the particular forms of the elements are dissimilar. They, however, are located in the same relative positions in the entire device, perform exactly the same functions as the flanges 15 and 20 in Webb and 16 and 33 in Wallace patent '408.

The Rogers illustrates a retaining clamp which has the added safety feature first illustrated in the Webb patent, and which illustration in the Webb patent is practically identical with the safety feature illustrated in the Wallace patent '408.

Q. Have you finished your description of this patent?      A. Yes.

Mr. F. W. Lyon: I believe that is all, your Honor, at this time.

The Court: Cross-examine.

Mr. Mason: Did I understand that you wanted to put Mr. Finkle on before I cross-examined?

Mr. F. W. Lyon: Yes; because there might be certain things he wanted to cross-examine Mr. Hackstaff about after he has seen certain demonstrations of how these devices are put together. I would like to call Mr. Finkle out of order just for that purpose.

The Court: All right. We will take a recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Friday, January 24, 1947.) [196]

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Los Angeles, California, Friday, January 24, 1947  
2:00 P.M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor.

(Case called by the clerk.)

Mr. Mason: Ready for the plaintiffs.

Mr. F. W. Lyon: Ready, your Honor.

The Court: Proceed.

Mr. F. W. Lyon: Mr. Finkle, will you take the stand, please?

Your Honor, I got a continuance in this case once before because Mr. Donald Finkle had broken his leg, and we said that he was a necessary witness. Now, the man is still ill, and I am unable to bring him in, but I think possibly we can get by without him. I have called his son in his place.

### GEORGE H. FINKLE

called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: George H. Finkle.

(Testimony of George H. Finkle.)

Direct Examination

By Mr. F. W. Lyon:

Q. Mr. Finkle, what is your connection with the defendant in this case, Donald Finkle, and with the Wedglock Company? [197]

A. I am the vice-president of the Wedglock Company and I manage the business.

Q. While your father was operating the business as an individual, what were your duties?

A. I was manager. That was prior to 1942. From April, 1941, until, I believe it was May of 1942 I managed the business for him.

Q. Then what?

A. Then the partnership of myself and Ralph Head was formed, and that operated until July 13, 1945.

Q. You are familiar with all of the clamps manufactured during the time you have testified to?

A. Yes.

Q. And do you know how they are assembled?

A. Yes.

Q. Could you demonstrate to the court how a clamp such as Exhibit G is assembled?

A. Yes. I can give the preliminary assembly of it. That is——

Q. Well, you can show us how it is done?

A. Yes.

Mr. Mason: If your Honor please, Exhibit G is not charged to infringe in this case, and I don't see the materiality of this.



(Testimony of George H. Finkle.)

Mr. F. W. Lyon: Your Honor, the only difference claimed [198] that is made by the plaintiffs is that Exhibit G differs from Exhibit 11 only in that it has a solid bottom with no end cover of any kind, and they have made the contention that the main basis of novelty in their patent is in the method of assembly, that their method is so much cheaper, quicker, and everything. We want to show exactly how the old solid bottom was assembled and how the latest type is assembled.

The Court: There was testimony of that kind.

Mr. Mason: Do I understand from this line of testimony that you are going to produce here, that you are attacking the utility of the patent in suit?

Mr. F. W. Lyon: No, I am not attacking the utility of the patent in suit.

Mr. Mason: But you are using a cap, and that is the only thing we charge, and in that form of clamp. That is the only thing we charge to infringe. Just to show how many other ways you might do it, unless you are doing it, well, I don't see the materiality of that.

Mr. F. W. Lyon: There is no statement in the patent in any place as to the method of assembling it.

Mr. Mason: This is not a method patent. It is a structure which enables you to assemble it in an economical manner.

Mr. F. W. Lyon: If the Court please, I believe that the plaintiffs have attempted to build up the patent and show that it has a commercial use by the fact that it can be assembled more cheaply.

(Testimony of George H. Finkle.)

The Court: In about a third of the time, I think, was the testimony.

Mr. Mason: Your Honor, we are speaking of clamps in issue here. These are not in issue at all.

Mr. F. W. Lyon: We can put them in issue.

Mr. Mason: I don't want them in issue. We are not charging that this exhibit——

The Court: Exhibit G?

Mr. Mason: ——G infringes, nor are we charging that Exhibit 10 infringes. Now, to show how the plaintiffs might assume to assemble that clamp, I don't see how that is going to be helpful, and it is an attack on the utility of something you have copied.

The Court: Mr. Mason, I will ask you this question, then: As to this point that was made here by the plaintiffs with reference to the time consumed in assembling the device, did that include the assembling of this part of the device?

Mr. Mason: That included that part.

The Court: In computing the time?

Mr. Mason: Yes.

The Court: Then for that purpose I will permit it to be received.

Mr. F. W. Lyon: Not only for that purpose, your Honor, but they have introduced evidence here, in Exhibit 22 in [200] particular, and we are certainly entitled to show that Exhibit 22 is entirely false and the statements of Mr. Livingston are entirely false. [201]

(Testimony of George H. Finkle.)

They introduced that evidence. I am only rebutting it.

Mr. Mason: No matter what this witness might testify, it would not show that is false. Mr. Livingston testified as to the plaintiffs' procedure. Now, whether the defendant might follow that same procedure would not render Mr. Livingston's testimony false.

The Court: I will hear the testimony.

Q. (By Mr. F. W. Lyon): All right. Will you describe what you have there in front of you, Mr. Finkle?

A. I have here what we call a stringing jig which is used in the first operation of assembling the solid body fastener. We have been referring to these as "spreaders", haven't we?

Q. No. A. Not spreaders, but the——

Q. Pins.

A. ——pins. I take the two pins and insert them in the jig which holds them firmly in place. They are now locked in place. And I take the spreader and insert it—I don't know that I can do as well as the girls but I will try—then I bring the body over, pull the assembly out, and the T is in place.

Q. From there on all you do is add the spring under pressure?

Mr. Mason: Let us complete the clamp. [202]

A. Well, I can't do that without bringing another unit in here, and that is to compress it and



(Testimony of George H. Finkle.)

insert the—we have this unit here with the spring on it, we bring it this way, we press it down and insert a cap over there and insert a spreader over the two ends. It has come apart, though. The two ends are spread out and then interlock in place.

Q. (By Mr. F. W. Lyon): In that manner of positioning the spreader and the wires through the body, does the length of the body make any difference in the operation or in the length of time that is required to assemble it? A. No.

Q. If the body was six or seven inches long, it would not make it any more difficult?

A. No. We would probably make the jig a slight difference, but it would be exactly the same operation.

Q. Well, the jig would just have to be made longer? A. That is right.

Mr. F. W. Lyon: I think that is all that I need of this witness at this time, your Honor. He has other evidence, too. We want to go on with this cross-examination of Mr. Hackstaff if I may recall him later.

Mr. Mason: Are you going to recall him later?

Mr. F. W. Lyon: Yes.

Mr. Mason: I will wait, then, for cross-examination. [203]

Mr. F. W. Lyon: Step down, Mr. Finkle.

## JOHN D. HACKSTAFF

recalled

Mr. Mason: Are you through with Mr. Hackstaff?

Mr. F. W. Lyon: I would just like to ask him a few more questions.

## Direct Examination

(Resumed)

By Mr. F. W. Lyon:

Q. Mr. Hackstaff, have you colored a drawing from the Wallace '408 patent, Exhibit H-2, and the Wallace '929 patent, Exhibit H-11, in the same manner as you did the previously colored drawings?

A. I have colored the Wallace '929 patent and the Wallace '408 patent in the same way; that is, I have colored the housing and the end wall thereof in each case blue.

Q. Green you mean?

A. Green. The retaining pin and its head, red; the spreader, yellow; the spring, blue.

I have also colored the end cap of the '929 patent, element 9, and the end cap of the '408 patent, element 11, brown.

Mr. F. W. Lyon: All right; that is all I wanted to direct your attention to. [204]

## Cross-Examination

By Mr. Mason:

Q. Mr. Hackstaff, will you examine Plaintiffs' Exhibits 11-A and 12-A and state whether it is not true that in each of those exhibits, in addition to

(Testimony of John D. Hackstaff.)

the end cap, you have two washers, one beneath the spreader and one above the spreader, which washers are denoted Wa and Wb in Exhibits 17 and 18?

A. These two exhibits have——

The Court: Now, refer to these two exhibits by numbers.

A. These two exhibits, 11-A and 12-A, have two washers, one above and one below the cross-arm of the T spreader, which are free within the body of the housing and are not connected in any way with the shell of the housing.

Q. (By Mr. Mason): Now, why did you leave those out of Exhibit L? I believe that is Exhibit L.

A. One of the washers is shown in Exhibit L, in each case, the yellow at the bottom.

Q. That would correspond to the bottom washer, would it? A. Yes.

Q. You do not have anything to correspond to the top washer?

A. Not on this drawing. This drawing was made from a device which, instead of using a T-shaped spreader, uses a spreader which is cross-shaped, so that the cross, upper [205] cross member, or the upper member of the cross projects upward into the center of the spring and centers the spring on the spreader. Sometimes the devices which I used, from which I made these drawings, did not have another T.

Q. You have not made your drawings, then, to comply strictly with the stipulated structure as illustrated by Exhibits 17 and 18?



(Testimony of John D. Hackstaff.)

Mr. F. W. Lyon: I object to that, your Honor. The stipulation that I entered into was that the drawings 11 and 12 are one type of the devices made by the defendants, but that we make them with washers above, below, sometimes only upper washers, sometimes just a lower washer, and sometimes no washers.

Mr. Mason: I do not remember of the other mentioned in the stipulation.

The Court: Well, you can clear it up, gentlemen.

Mr. F. W. Lyon: Because I have personally pulled a lot of these apart and have found them made all ways.

Mr. Mason: Well, isn't it true—I am asking counsel here—isn't it true that the regular structure is intended to have two washers?

Mr. F. W. Lyon: No; it is not. That is just what I am trying to say. Are you charging the infringement only of the one with two washers?

Mr. Mason: No. I claim it does not make any difference [206] whether you have one or two. But the expert here has made certain statements, where he has called a single washer as one element, and it may make a difference if you had two washers.

Mr. F. W. Lyon: We make them with both, two washers, one washer up above, sometimes one below, sometimes no washers. And I believe all types are before the court.

The Court: That clear that.

Q. (By Mr. Mason): I believe you have testified, Mr. Hackstaff, that in these sheet metal clamps

(Testimony of John D. Hackstaff.)

it is important that the retaining pins which project into the work sheet holes fill the holes?

A. The retaining pin, and in cooperation with the sections of the——

Q. Spreader.

A. ——of the spreader fill the holes, as shown by Rocroy and DeMooy.

Q. That is important in those clamps, isn't it?

A. Yes, sir.

Q. In other words, if they did not have that spreader portion between those pins, they would spring together?

A. Yes, sir.

Q. As I have been able to follow your testimony this morning, you have followed a line of reasoning which has enabled you to arrive at the conclusion that the defendant's [207] clamps, Exhibits 11 and 12, do not have an end cap, is that correct?

A. Just what do you mean by "an end cap"?

Q. A cap on the end of the spreader, on the end of the body.

A. The Exhibits 11 and 12 have an end bottom or body wall which is composed of a cup which is rolled into the end of the housing. When the cup is rolled into the end of the housing, the cup has—or, if you please to call it "cap"—becomes integral with the cylindrical portion of the housing and we get exactly the same kind of a member which is shown in the housing of DeMooy and in the housing of the patent '787, which housing is composed of a round body with an integral end wall 12.

(Testimony of John D. Hackstaff.)

Whatever you want to call this particular enclosure member, it is an integral part of the body after the clamp is assembled.

Q. Do you mean that it is integral with it or it is attached to it?

A. What is your definition of "integral"?

The Court: No, no. The witness cannot ask the counsel questions. Clear it up if the witness does not understand it, Mr. Mason.

Q. (By Mr. Mason): In other words, as distinguished from being cast as a part of the body or made as a part of the same casting or piece of metal, the cap 11 in Exhibit 17 [208] and the cap 27 in Exhibit 18 are attached to the body by being crimped around its peripheral edge?

A. The structure in the two exhibits, instead of using a casting in which the bottom of the casting is cast integrally with the shell, in one operation, is composed of two pieces, a shell and a bottom, which are then rolled and fabricated together. When the shell is completed it performs the functions of a single integral cup-shaped body.

Q. Then you mean that it performs the function, after it is assembled, being a unitary body; but, to begin with, it is two pieces and they are attached together, is that correct?

A. In a body, yes; performs exactly the same function as if it had been made in one piece.

Q. In patent '787 this cap 27 would, by your same definition, be an integral part of the body, wouldn't it?      A. Yes.



(Testimony of John D. Hackstaff.)

Q. I am referring to the cap 27?

A. Yes; when it was applied. Its functions, however, will be entirely different from the other part of the bottom of the body which is known in the patent as the bottom wall 12. This cap 27 is superimposed below the bottom wall 12.

Q. Cap 27 in Exhibit 16 functions to hold the cross-arm of the spreader 25 against outward longitudinal movement with relation to the body, doesn't it? [209]

A. The use of that cap to hold the cross-arm in the slots in the body is the essence of—is described in the Wallace patent.

Mr. Mason: Can you answer my question yes or no? Will you read the question, please?

(Question read by the reporter.)

A. Yes, sir.

Q. Your answer is "yes"? A. Yes.

Q. Isn't that the function of the cap 11 in Exhibit 17?

A. That is one of the functions of the cap 11 in Exhibit 17.

Q. And the cap 27?

A. Is one of the functions of the end wall of the Exhibit——

Q. That is 17. A. ——17.

Q. And one of the functions of the cap 27 in Exhibit 18?

A. One of the functions; yes, sir. [210]

(Testimony of John D. Hackstaff.)

Q. Now, in Exhibit 17 the washer Wa serves as a bearing member for the end of the spring 32, doesn't it?      A. No, sir.

Q. What does it do?

A. It is a washer in position between the spring and the end wall, simply as a washer. The force of the spring is transmitted through this washer, which is loose in the body. The only way the force of the spring can be resisted by the end wall of the body is by the end wall of the body. The elimination of that washer would not change the operation of the device in any way, shape or form.

Q. The spring does bear at its lower end against washer Wa, does it not?      A. Yes, sir.

Q. And the same is true in Exhibit 18, the lower end of this spring bears against washer Wa?

A. Yes, sir. Both washers are entirely independent of the body.

Mr. F. W. Lyon: I believe, Mr. Mason, we had an earlier stipulation that Exhibits 17 and 18 and 11 and 12, that we need not question as to both of them individually, because they are the same.

Mr. Mason: Thank you for reminding me.

Mr. F. W. Lyon: So we do not need to duplicate the testimony. [211]

Mr. Mason: Only in the respect——

Mr. F. W. Lyon: Of the cap and the plunger.

Mr. Mason: One of them is not charged to infringe Patent '787.

Mr. F. W. Lyon: No, '408. Both are charged to infringe Patent '787.

(Testimony of John D. Hackstaff.)

Mr. Mason: I mean '408.

Q. (By Mr. Mason): Which of the patents, Mr. Hackstaff, which you have discussed, do you considered to be the most pertinent to the Patent '787, Claim 11?

A. The second DeMooy patent, '188, which is illustrated in Exhibit J.

Q. That is what you consider the most pertinent art? A. Yes, sir.

Mr. F. W. Lyon: That is Exhibit H-7, isn't it?

The Witness: H-7, in which the colored drawing has been introduced as Exhibit J.

Q. (By Mr. Mason): I believe you testified this morning that in these sheet metal clamps it is important that the work-engaging surface, the sheet-engaging surface of the clamp be smooth, otherwise it will mar the sheet; isn't that correct?

A. Some people believe that it should be smooth so as not to mar the sheet. Webb provides a rubber washer for that purpose. Wallace says the cap 27 has an outward curved [212] work-engaging surface 27a so that as the device is held against the work only a minimum contact surface is presented whereby to minimize the chance of marring the surface of the work.

Q. I asked you what your view was. Isn't it important that the sheet-engaging surface of the clamp be smooth, as distinguished from rough?

A. Yes, with soft metal sheets; with hard metal sheets it is immaterial.



(Testimony of John D. Hackstaff.)

Q. For instance, in working on aircraft sheets the metal of the clamp is harder than the metal of the sheets? A. Yes.

Q. So that it would be important to have a smooth surface, is that correct? A. Yes.

Q. Now, in DeMooy '188, in order to hold his spreaders on the body DeMooy cuts a groove into the integral end wall of the body, and he mounts his spreader in that groove. Then to hold the spreader in the groove he peens over the edges of the groove or provides ears at the end of the groove which he bends over the cross arm of the spreader, isn't that correct? A. Yes, sir.

Q. The groove and the spreader are thus exposed to the work sheet? A. Yes, sir.

Q. Now, in De Mooy '188 he would necessarily have to [213] have a groove in order to mount his spreader, wouldn't he,

A. That is the way he describes his apparatus exactly; the same way that Wallace describes his apparatus, having a groove in the slot, in which he, as I recall from the file wrapper in evidence, represented to the Patent Office that it was a very important feature of his invention.

Mr. Mason: I move to strike the latter part of the answer as not being responsive, that is, the part as to what Wallace says.

The Court: Stricken as having been volunteered.

Q. (By Mr. Mason): Now, isn't it apparent, Mr. Hackstaff, that by providing that groove in

(Testimony of John D. Hackstaff.)

the outer surface of the end of the body and providing that type of mounting of the spreader, De Mooy is trying to arrive at a structure by which he could insert his pins through one end of the body and apply the spreader between the pins from the other end of the body?

A. In De Mooy's structure it is essential that the pins be inserted from within the body and through the end wall from its upper side. De Mooy then positions his spreader on the bottom side of his end wall, after the pins have been pushed through the end wall.

Q. Did you complete your answer?

A. Does that answer your question?

Q. Then isn't it apparent to you as an engineer that what he was seeking to do was to provide a structure by which [214] he could mount his spreader from the outer end of the body?

A. From below the bottom of the body, yes, sir.

Q. Now, you know that De Mooy is an employee of the Cleveland Automatic Tool Company?

A. I have heard so.

Q. That is the company that manufactured the Cleco clamp, Exhibit 13?

A. Yes.

Q. It would appear, then, that De Mooy was trying to improve the two-prong type of clamp, as distinguished from the single-prong type of clamp as shown by the Cleco clamp, Exhibit 13?

Mr. F. W. Lyon: Your Honor, counsel is asking the witness to suppose something that is plainly hearsay. To begin with, it is based on nothing but what he has heard. He said something about Mr.

(Testimony of John D. Hackstaff.)

De Mooy, and he is asking now about a supposition of something that might be in somebody else's mind.

The Court: But this is cross-examination, and in cross-examination counsel can assume any problem that they wish.

Mr. F. W. Lyon: He could assume it, but he is asking him a question, did this man have that in his mind. How he could answer such a question, I wouldn't know.

Mr. Mason: I didn't ask him that question.

The Court: I assume that he could properly be asked what [215] the purpose of this was, to contrive it in this manner, if it was to minimize the work, or if it was to make it of greater facility in operation. I assume that is correct.

Mr. F. W. Lyon: If that question has been asked, I would have no objection, but his question was what was Mr. De Mooy thinking about.

The Court: It is clear to the court that that was what was meant. When you ask if that way the phraseology may not have been accurate. Can you answer the question, Mr. Witness?

The Witness: The De Mooy patent on its face in its specifications discloses a bifurcated pin clamp of the same general character as Rocroy's, and specifically positions his spreader on the face of the bottom of the body in a slot that is cut in the bottom of the body.

Mr. Mason: I don't think you have replied to my question. Would you kindly read the question?

(The question referred to was read by the reporter.)



(Testimony of John D. Hackstaff.)

The Witness: Mr. De Mooy shows an improvement in the two-pronged type of clamp of Rocroy.

Q. (By Mr. Mason): You know, do you not, Mr. Hackstaff, that this clamp made by De Mooy Patent '188 never went into commercial use?

A. I have no knowledge on the subject whatsoever.

Q. I show you a sub-assembly, Exhibit E, and ask you if that could be mounted in the device shown by De Mooy '188. [216]

A. In what part of the device '188?

Q. Whatever it is intended to be in the clamp.

A. No. It has an entirely different position of the spreader. This Exhibit F is a sub-assembly of one of the defendant's clamps. The cup is the bottom end wall of the housing. The spreader in Exhibit F is positioned so that it will be inside of the housing on the top face of the bottom of the housing. De Mooy's patent calls for the spreader to be positioned in slots on the outside of the bottom of the housing.

Mr. F. W. Lyon: Just a minute. For correction, the exhibit you have just been testifying about is Exhibit E and not F, isn't it?

The Witness: I guess it is.

The Clerk: That is E.

Mr. F. W. Lyon: That is E and not F.

Q. (By Mr. Mason): Have you examined the file history of Patent '787?           A. Yes, sir.

(Testimony of John D. Hackstaff.)

Q. Now, isn't it true that the Patent Office cited and considered in that file wrapper the De Mooy Patent 2,269,188, the A. T. S. Patent 413,403, and the Rocroy Patent 443,683?

A. I believe that is correct, and also the Verdon Roe patent.

Q. It considered other patents also, but I mean it did [217] consider those patents you have discussed here? A. Yes, sir.

Q. Now, in discussing the Rocroy Patent 443,683, which is Exhibit H-4, I believe you testified that the patent was very vague as to how the spreader was mounted. At least you can tell, however, that the patent does not show an end cap over the lower end of the body; isn't that true?

A. Yes. There is no separate element shown as an end cap, nor specified as an end wall.

Q. In none of the patents that you have discussed have you found any one which shows a cap over the outer end of the body, with a cross arm of a spreader mounted on the inner surface of the cap and projecting outwardly through a hole in the cap between two reciprocating clamping pins or retaining pins, have you?

A. That particular construction is shown in the Wallace Patent '787, yes, sir.

Q. In any other patents you have discussed you did not find that, however?

A. No, not that particular method of holding in the spreader, except that if you turn to the Blanc patent you will find that the spreader and a washer

(Testimony of John D. Hackstaff.)

is dropped into the housing and rests on top of the bottom of the housing. If Blanc should have made his housing in two parts, and you called the bottom of it, because it was made in two parts, a [218] cap, under those circumstances, why, you would have found the Blanc spreader resting on a cap and sticking out through the hole in the bottom of the cap, which cap in that instance would have been the bottom of the housing.

Q. However, you did not find that Blanc showed a separate cap, did you?           A. No, but——

Q. Now, will you point out to me what you call the spreader in Blanc?

A. I call the spreader in Blanc, “Referring to the illustrative structure, 10 represents a pin or elongated element which has the upper end thereof threaded,”—I am wrong there.

The Court: Strike it out.

The Witness: Strike that out, please. (Continuing):

“In the counterbore 16, there is located”—this is Page 1, Column 2, Line 22—“there is located, in engagement with the bottom wall thereof, a washer 18 having a radially disposed slot 19 extending somewhat beyond the center of the washer and of a width substantially equal to the normal diameter of the pin 10. The washer 18 is also formed with a stem 20 depending therefrom and extending through the bore 17 of the cap 15.”

In this case Blanc calls the end of his body a cap.

Q. (By Mr. Mason): It is cast as an integral part of the [219] body?



(Testimony of John D. Hackstaff.)

A. I don't know how he formed the cap—how he formed the body.

Q. Does it show as a separable element?

A. Does he show his body and his end wall as a unitary piece or an assembly of two pieces which are joined together to form a unitary element?

Q. That is what I am asking you.

A. He shows it as one.

Q. Now, in this Blanc patent he uses merely a single retaining pin; isn't that true?

A. Yes, sir.

Q. And the element 20 merely served to fill up a part of the hole along with the pin. It doesn't spread two pins apart?

A. It springs the pin apart so that it performs exactly the same function with the single pin that the T-shaped spreader of Rocroy—of De Mooy's second does with the two pins.

Q. In Rocroy the spreader spreads two pins apart, being between it, doesn't it?

A. It holds—in the Rocroy device the spreader and the two parts of the pin are held normally so that they fill the rivet hole. When the pin is drawn close to the sheet, the spreader prevents the points of the pins being sprung or [220] moved together so that they can enter or retract through the rivet hole. The pin or stem 20 of Blanc performs exactly the same purpose. It, with the portion of the pin, fills up the rivet hole, and it prevents the head or holds the single rod in such a position that the enlarged head of it engages the side of the rivet. There

(Testimony of John D. Hackstaff.)

is no difference whatever in the function or manner of operation, whether it is a pin in one rod, as shown by Blanc, or a spreader and bifurcated pins, or going back to A. T. S., probably having three or four resilient pins. They all worked the same way.

Q. You say it makes no difference whatsoever in function. Have you ever applied one of the Cleco clamps made under the Blanc patent in comparison with applying a clamp such as Exhibit 12?

A. When you use——

Q. Fill one in these holes.

The Court: Now, what exhibits have you?

Mr. Mason: He has Exhibit 13, the Cleco clamp, and he is operating it with the gun, Exhibit 15, to apply the retaining pin into the hole of Exhibit 14.

The Witness: When you project the pin, the retaining pin of the Blanc, after you insert it in the hole you have to move the clamp sidewise a little in order to enter the pin in the hole. The Blanc device does not have the direct vertical axial alignment of the pin with the rivet hole that is [221] shown in the Rocroy device and in the A. T. S. device. With the Blanc device, I am told that in operation there was a slight S motion in putting it in and a slight S motion in pulling it out.

Q. And after it is in position, it only clamps from one side of the hole?

A. After it is in position, it only clamps from one side of the hole.

Q. Whereas in a two-prong clamp, such as Exhibit 12, it clamps on two sides of the hole and gives a balanced clamping action?

(Testimony of John D. Hackstaff.)

A. And if you have a four-sided clamp, like in A. T. S., it clamps on four sides of the hole.

Q. And in Blanc, what you call a spreader does not spread apart two pins which go into the hole?

A. In the Blanc—in the Rocroy——

Q. I am speaking of the Blanc patent now.

A. The Blanc, having only one pin, can't spread two pins apart.

Q. Then the function of the Blanc patent is not identical with the clamps here involved, that is, plaintiffs' clamps and defendant's clamps, Exhibits 11 and 12?

A. The function is identical.

Q. Didn't you just testify that one provided a one-sided clamping action and the other provided a two-sided [222] clamping action and one you had to weave into the hole, and the other you could insert actually into the hole?

A. By "function" I mean what the device accomplishes, and how it accomplishes it. The function of all of these devices is to provide an apparatus or device in which the retaining pin, when it is projected from a distance beyond the bottom of the housing, can be entered into the rivet hole, but when the retaining pin is retracted close to the housing it cannot be pulled out of the rivet hole. Each one of the patents that we have discussed has this primary function and characteristic of the retaining pin or pins.

The Court: You don't mean they can't be retracted, because they later come along and rivet in those places, don't they?



(Testimony of John D. Hackstaff.)

The Witness: They take them out, your Honor. They use the gun.

The Court: To insert it?

The Witness: They use the gun to insert it. They also use the gun to remove it. When they use the gun——

The Court: I was going to say I thought you said it stayed in there.

The Witness: It does. [223]

The Court: But they remove it.

The Witness: It will now enter the hole.

The Court: That is right.

The Witness: It has now. You see, it rests on there, sir.

Mr. F. W. Lyon: I am just handing the witness a couple of plates similar.

The Witness: Too small.

Mr. F. W. Lyon: Well, use these.

Mr. Mason: Use this hole. One of those holes fits it. I don't know. The next one, I guess. Try the second one.

The Witness: It has now entered.

The Court: That is right.

Mr. F. W. Lyon: Now, the next one.

The Witness: Look out, sir. This is liable to shoot if it gets loose out of here from this gun.

The Court: It will be all right if it hits one of the attorneys and does not hit me.

Mr. F. W. Lyon: I would warn your Honor to be very careful in handling those, because they have quite a lot of force on those springs.

(Testimony of John D. Hackstaff.)

The Witness: This particular clamp will not go——

The Court: You are right in the line of it there.

Mr. F. W. Lyon: No; they come your direction.

The Witness: You enter it.

The Court: Yes.

The Witness: Now, when you let this come out it is caught.

The Court: That is right.

The Witness: Now, when you want to take it out, you reverse the operation; you push it forward.

The Court: That is right; loosening it.

The Witness: Loosening it.

The Court: Yes, certainly.

The Witness: It only goes in and comes out when the pin is extended a considerable distance beyond the base of the housing.

The Court: That is all right.

The Witness: When it is close to the base of the housing, it cannot either go in or go out. That is the function of the device of the retaining pin in the A-B-C-D combination.

Q. (By Mr. Mason): Now, you refer to the A-B-C-D combination. Do you want us to believe from that statement that all of these patents, H-3, H-4, H-5, H-6, and H-7, show the same structure?

A. H-3——

Q. That is the A. T. S., the Rocroy, the Blanc, and [225] the two DeMooy patents.

A. Do they show the same structures? Each of them has structures which have four cooperating

(Testimony of John D. Hackstaff.)

elements, and they have specifically designed elements which perform the same function in the combination in each case. If the A. T. S. people had gotten their claim, which they obtained, their claim 1, patented in the United States, and if the patent was good, they would have read upon every one of these structures, because each one of the structures would have contained the elements described in that claim, physical elements described in that claim.

Q. And the subsequent patents contained improvements over A. T. S., is that correct?

A. They are all improvement patents over the A. T. S.; yes, sir; and therefore must be limited to the specific improvements which they describe.

Q. And you would classify the Wallace patents '787 and '408 as improvement patents, wouldn't you?

A. Yes, sir; they are improvement patents. The——

The Court: Now, you have answered the question. We have a great deal of repetition here, gentlemen, on both sides. Go ahead.

Q. (By Mr. Mason): Now I will ask you to refer to drawing, Exhibit 17, which is a drawing of Exhibit 11, and ask you if you can conceive of any way in which that precise [226] structure illustrated there could be assembled without having a cap which could be applied to the end of the body after the interior construction had been inserted in the body?

The Court: Now, repeat the question, Mr. Reporter.



(Testimony of John D. Hackstaff.)

Mr. Mason: Will you read it, please?

(Question read by the reporter.)

Mr. Mason: Is that clear?

The Witness: Will you read the question, please?

(Question again read by the reporter.)

A. Yes; I can.

Q. Will you tell us just how you would do it?

A. I would assemble the—I would, first, in each one of these devices——

Q. Now, keep your answer to Exhibit 11 or Exhibit 17 which is the drawing.

Mr. F. W. Lyon: Your Honor, that imputed that the question be either reworded or corrected. He has defined the structure and then asked if he could make that structure any other way and still have the parts in the structure.

Mr. Mason: That is not the question. Read the question again.

Mr. F. W. Lyon: He said to leave no part out, and still construct the device with the part left out.

The Court: No; I do not think so. Repeat the question.

(Question again read by the reporter.) [227]

Mr. F. W. Lyon: Your Honor, the structure, he says, already has a cap on it; and he says: How can you make it without the cap on it and still have what is shown here.

(Testimony of John D. Hackstaff.)

The Court: I understand what he means, although maybe the witness does not. If he does not, he can ask.

Mr. Mason: Did you understand it?

The Witness: I understand it perfectly.

The Court: I understand it.

A. Yes; I would take that body, and if I was to manufacture it, I would leave off this flange right here and after I had assembled all the guts of the apparatus in the body and this permanent end wall, I would roll in or mill in the top end of the body so as to hold the apparatus in place.

Q. (By Mr. Mason): Now, you stated the final step. How would you go about assembling this part before you put in this element 17?

A. On the two pins I would assemble the spring, the washers, the clamp, and, with the proper jig, insert the pins down through the hole, drop in the element 16 on top and turn in the top flanges; just exactly as Webb proposes to construct his structure which has a similar thimble on top.

Q. You know, do you not, that you cannot insert these heads of the pins and the spreader through the opening in the [228] end wall?

The Court: In the bottom.

Mr. Mason: In the bottom, at the same time, do you not?

A. I know that you can't insert the spreader and the heads of the pins at the same time, therefore, I would hold back the heads of the—project the pins in advance of the spreader.

(Testimony of John D. Hackstaff.)

Q. How would you hold the spring compressed, bearing in mind that that is about a thirty-pound spring?

A. I think there would be no trouble in making a jig that would do that, sir.

Q. You would have to hold it compressed while you were inserting it; you could not get the jig into the body, could you?

A. Yes; I can conceive of such a thing being done.

Q. Well, what kind of a jig would you make to do that? Can you explain how it would be done?

A. No, sir; I can't at this moment without some thought of it. That is a tool-makers job which is very simple compared with the jobs that tool-makers are doing all the time. I am in the same boat as——

The Court: Now, ask the next question.

Q. (By Mr. Mason): These pins are made of very hard metal, aren't they?

A. Yes, sir—no. [229]

Q. Gamma wire?

A. They are made of elastic metal; yes, sir.

Q. You have spoken of bending these ends down after you apply it to the body?      A. Yes, sir.

Q. How would you hold the pins while you were bending that down?

A. I don't follow you, sir.

Q. Well, in order to bend these ends of the pins over—and I will refer to Exhibit 11-A; I believe you can see it in 12-A better—would you not have to hold the remainder of these pins 20 very firmly



(Testimony of John D. Hackstaff.)

by some means in order to bend over this gamma wire, as shown at the top end where it is bent over the washer?

A. If I were to—a method by which the Exhibit 11-A can be assembled—and there are various ways of assembling, depending entirely upon the ideas of the manufacturer—would be as the final step in your operation, the pushing, the spinning in of the top member of the housing.

Q. I understand that.

A. I would assemble the pins, the washers on a spreader, on a jig similar to the one which I saw demonstrated this morning, insert the pins and the washers through the end of the bottom end of the housing, put it in a jig, drop the spring on, compress the spring against the bottom of the [230] housing to form the wires, turn the wires over the end of the top, drop on the tool-engaging member and lock it in by turning in the top edge of the housing.

Q. In order to insert that from the bottom end, you state, however, you would have to have a cap to close that after you had completed it, wouldn't you?

A. I did not say to put it in from the bottom end. I said that I would put it in from the top end exactly the same way that you have got to assemble '787, the only difference being that I would have to slip on the spreader so it would be left inside of the housing, instead of slipping it on the outside of the housing as '787 describes.

(Testimony of John D. Hackstaff.)

Q. No matter how you would proceed, however, you would have to bend over the ends, bend the top ends of the retaining pins over this washer while the retaining pins were mounted in the housing, wouldn't you?

A. Yes. Yes, sir. Another way in which that device can be assembled, I would make the housing in two parts, saw it in between the two shoulders.

Q. I am asking you to confine your answer to this precise structure.

A. And then join the two halves.

Q. In your answers this morning and in discussing the patents in suit, '787 and '408, you confined your description to what is shown in the drawings, rather than what is set [231] forth in the claims, did you not?

A. No, sir. In the claims?

Q. Yes.

A. What was set forth in the drawings and in the specifications; yes, sir.

Q. But not in the claims; you did not go into the claims?

A. Not in discussing it this morning, excepting when I discussed claim 2 of '408.

Q. As a patent expert, you realize, do you not, that in preparing a patent the purpose in showing a drawing is to show one way of carrying out the invention; isn't that true?

A. Yes; within certain limitations. You have got to show a practical way of turning it out.

Q. And in your specifications you describe what you have shown in your drawings?

A. Yes.

(Testimony of John D. Hackstaff.)

Q. Then in your claims you claim it so that you can define the scope within which you may depart from those details; isn't that true? A. No.

Mr. F. W. Lyon: If your Honor please, this is getting to be an argument with the witness over what the law is and not what any facts are.

Mr. Mason: He is a patent expert. I wanted to feel him out.

Mr. F. W. Lyon: That is a matter of law and not a matter of even opinion evidence or factual evidence.

The Court: I think it is going a little far, counsel. I am very liberal in cross-examination.

Mr. F. W. Lyon: I didn't hear the ruling.

The Court: Repeat it.

(Record read by the reporter.)

Q. (By Mr. Mason): Which of the patents that you have discussed here do you consider to be the most pertinent to patent '408?

A. The Wallace patent, H-11, '929, and the Webb patent, H-8, '634.

Q. You have examined the file history of that patent, haven't you, or file wrapper?

The Court: Which one? You mentioned two.

Mr. Mason: '408.

The Court: All right.

A. Yes, sir.

Q. Now I show you Wallace patent 2,292,498, which was cited also as a reference, and ask you if that is not, [233] insofar as the patent '408 is



(Testimony of John D. Hackstaff.)

concerned, in all material respects the same as the patent '929, Exhibit H-11?

A. No, I don't think this is the same as '929. If it is, how would it be patented?

Q. What are the differences?

A. In '929 the housing or the spreader is located in a space between the end of the housing and a cover cap. In this patent '498 there is another element added, which is a plastic of some sort, and a differentiation was made, as I recall the file wrapper, between the mounting of the spreader in the drawing shown in '408 and the way the spreader was mounted in patent '498, and the allowance was obtained on that representation.

Q. In this patent 2,292,498 the spreader is held against outward longitudinal escape from the body by means of a cap, is it not?

A. By means of a cover cap which is appended to the bottom of the housing and which cap does not in any way, shape and form co-act with the spring in the operation of the device.

Q. Well, does it co-act with the spring in '929?

A. No, sir; that is, the cover cap in '929 does not co-act with the spring, either.

Mr. Mason: I offer this patent into evidence as being the other patent cited by the Patent Office against the [234] application for patent '408.

The Court: Referring now to F. C. Wallace patent, August 11, 1942, No. 2,292,498, filed November 21, 1941?

Mr. Mason: That is right.

(Testimony of John D. Hackstaff.)

The Court: Into evidence.

The Clerk: Plaintiffs' Exhibit No. 23.

Q. (By Mr. Mason): Will you now refer to the Webb patent 2,256,634?

The Court: H-8.

Q. (By Mr. Mason): In that patent isn't it true that there is no spreader between the pins 12?

A. Sir?

The Court: Mr. Reporter, repeat the question.

(Question read by the reporter.)

A. Yes, sir; there is no spreader in between the pins 12.

Q. (By Mr. Mason): And if the flange 20 were to yield, allowing the barrel of the plunger 16 to escape, there would be nothing to prevent that entire inner assembly from flying out of the clamp, would there? A. Yes, sir.

Q. What?

A. When the pressure on 18 is released, the extension of the spring 29 would retract the pins so that the cams on either sides would co-act with the interior bore of the [235] plug 34 which has been inserted to close the end of the body, and it would cause the two prongs to separate and, in each case, they would contact against the bottom of 34.

Q. Now will you refer to Figure 6? The pins are in spread condition there, are they not?

A. Yes.

Q. By virtue of these cam elements 57 engaging the——

(Testimony of John D. Hackstaff.)

The Witness: Did I refer to Figure 6? I don't recall having done so.

Q. Well, I am asking you to refer to it now.

A. All right.

Q. In that view the pins are retracted, are they not, and spread apart? A. Yes.

Q. Now, isn't it apparent to you that this hole through the body—I believe it is designated 58 in Figure 6—is large enough to entirely pass those cam portions 57 and the outer ends of the pins?

A. If the hole in the bottom, the middle of the bottom of any of these clamps is made large enough, why, there is nothing to keep the enlarged pins from going through.

Q. I am asking you the question as to Figure 6 of the Webb patent.

A. Yes; Figure 6 shows the inner hole through the bottom of the housing sufficient size, seemingly, to let the [236] barbs pass up through them on that device.

Q. Well, does not that appear to be the same construction as in the other Figures? A. No.

Q. What difference do you find?

A. If you look on the page immediately above it on Figure 2, you will see that the pins within the block 34 filled the hole and, from the shape of the pins, the barbs project beyond, so that the pins would catch on the bottom of the block 34 when they were pushed out by the spring.

Q. I believe you testified that in these clamps it is essential that the retaining pins and spreader fill the hole of the sheet in order to operate positively?



(Testimony of John D. Hackstaff.)

A. Each of the patents states that this is a consideration to be desired.

Q. In the Webb patent that is not the case, is it?

A. I do not believe he mentions that fact to be the case.

Q. And in this Webb patent there was not involved any problem of how to mount a T-shaped spreader bar stationarily between and longitudinally of the reciprocal pins, was there?

A. No; it is not a spreader bar. However, the Webb does disclose that his body is a two-part body, in which he has a shell 11 which is closed by a bottom plug 34 which is [237] retained in position firmly with the body, where the body is rolled in in 25 and 26. In other words, he has a two-piece body which allows him to—that is his construction.

Q. In this British A. T. S. patent——

The Court: H-3, 413,403.

Mr. Mason: H-3?

The Court: H-3, 413,403.

Q. (By Mr. Mason): You do not find that he has any separate end cap on his body, do you?

A. No; he has not.

Q. Will you refer to Rogers, Exhibit H-9? In that patent the spreader element, which is a pin 19, is mounted in the top cover sheet 16; isn't that correct? A. Yes, sir.

Q. And if the flanged-over part of that sheet 16 were to become disengaged from the body, the spreader would come out from between the pins, wouldn't it?

(Testimony of John D. Hackstaff.)

A. If any flange which is made to hold anything fails, it will fail. If the flange 18 failed where it is crimped down over, the top end flange failed, the spring would then eject the top of the plate 16, the pin, and the retaining pins out of the housing if the heads of the pins did not prevent on their failure. The same thing would be true of the device manufactured by the defendant if the flange 16 failed or if 33 of the patent failed or if 15 of Webb failed. [238]

Q. If the flange 16 of Exhibit 17 were to fail, isn't it true that it would not in any way carry with it the spreader?

A. Are you assuming that the barbs have failed, first?

Q. No; I am not. You were mentioning the flange 17.

A. What is your assumption, Mr. Mason? I don't quite get it.

Mr. Mason: Would you read the question, and we will see if it is not clear.

(Question read by the reporter.)

A. Unless the barbs on the heads of the retaining pins failed or were not broken, what happened to the flange 16 would be immaterial; nothing would happen.

Q. In other words, there is no mechanical connection between the spreader in Exhibit 17 and the flange 16?

A. There is no difference between the flange 16 and the spreader and the end wall of the housing.

(Testimony of John D. Hackstaff.)

Q. In Rogers the spreader 19 is secured to the wall 16, which is the wall carrying the flange, is it not?      A. Yes.

Q. And if that flange were to yield and the wall were to escape, the spreader would go with it?

A. If for any reason that wall was called upon, 16 was called upon, to withstanding the spring, and therefore the pins were ejected from the housing, the mandrel would be [239] carried along with the head just exactly the same way as the spreader would be carried on out through of the defendant's device if the retaining pins were ejected from the housing.

Q. In defendant's device, Exhibit 11, the drawing, Exhibit 17, there being no mechanical connection between the spreader and the flange, if the flange 16 were to yield, the pins would still be locked in the body, would they not, because the spreader would be between them?      A. Yes.

Q. Now, that is not true of Rogers, is it?

A. No; that is not true of Rogers.

Mr. Mason: I think that is all, your Honor.

The Court: That is all. Any questions, Mr. Lyon?

Mr. F. W. Lyon: I have just one or two.

The Court: All right.

Mr. F. W. Lyon: May we have a recess?

The Court: How many witnesses after this?

Mr. F. W. Lyon: I have one, Mr. Finkle, here. I do not believe his testimony will take more than half an hour.



(Testimony of John D. Hackstaff.)

Mr. Mason: I may want to put Mr. Mattingly on, your Honor, for some rebuttal here.

The Court: We will take our afternoon recess.

(Short recess.) [240]

### Redirect Examination

Q. (By Mr. F. W. Lyon): Mr. Hackstaff, I believe during the recess you made a drawing or aided in making it. What happened to it?

A. It is over there on the desk.

The Court: I thought we were going to start on another witness.

Mr. F. W. Lyon: I had just one redirect question here.

The Witness: Those two last drawings have not been entered into evidence.

Q. (By Mr. F. W. Lyon): This is a drawing of a fastener. Will you please tell us what that drawing shows.

A. This drawing shows a fastener which has a housing, with an end wall and a center hole large enough to pass the pin heads through when they are coacting with the spreader.

Q. In other words, in the spread position?

A. Yes, which has two pins, which has a spring, which has a top for tool engagement, and which has a washer with a hole only sufficient to pass the pin heads in their retracted position.

The Court: That is only cumulative, counsel. We have had every bit of that.

(Testimony of John D. Hackstaff.)

Mr. F. W. Lyon: Wait a minute, your Honor. I have a purpose in this.

Q. (By Mr. F. W. Lyon): There is a spreader in this [241] device. Will you indicate the spreader?

A. A spreader carried by the washer.

Q. Now, that device you have just referred to is exactly like Plaintiffs' Exhibit 11, other than the size of the hole in the end wall of the body, is it not?

A. Yes, sir.

Q. And that device could be assembled without the use of a cap?

A. Yes, sir.

Q. And you could assemble the same sub-assembly and put it together?

The Court: Now, let the witness answer, counsel. Repeat it the way he has started his question.

The Witness: This device could be sub-assembled on the washer in exactly the same manner in which Exhibit 11-A is shown as sub-assembled on the bottom of the housing, and then the sub-assembly dropped into the barrel of the housing and locked in.

Q. (By Mr. F. W. Lyon): From which end of the housing would the sub-assembly be inserted?

A. From the top end.

The Court: That is very clear to the court, that you can't put it any other place. There have been a lot of questions by counsel on both sides which are very clear.

Mr. F. W. Lyon: That is all, your Honor. [242]

Mr. Mason: That is all.

Mr. F. W. Lyon: May I offer this last sketch in

(Testimony of John D. Hackstaff.)

evidence as defendant's next in number? Also, I believe we failed to put in those last two exhibits.

The Clerk: This will be Exhibit M in evidence, this sketch.

Mr. Mason: I object to the sketch as being immaterial.

Mr. F. W. Lyon: It is merely to illustrate the witness' testimony.

The Court: It is not immaterial, counsel. It goes to the weight of it.

Mr. F. W. Lyon: When I wish to put in the other two drawings. Do you have those colored drawings?

The Clerk: No.

Mr. F. W. Lyon: I will offer the colored drawings of the Wallace Patent 2,364,408, as defendant's next in number.

The Court: In evidence.

The Clerk: That will be N.

Mr. F. W. Lyon: And the Wallace Patent 2,269,929 as defendant's next in number.

The Clerk: That will be O.

Mr. F. W. Lyon: That is all, your Honor, with this witness. I wish to call Mr. Finkle.

The Court: All right. Mr. Finkle, will you take the stand? [243]



## GEORGE H. FINKLE

recalled as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

## Direct Examination

By Mr. F. W. Lyon:

Q. Mr. Finkle, what is the difference in time in assembling a solid-body type of clamp, such as shown in Exhibit 22, our Exhibit C, and Exhibit 11?

Mr. Mason: Is he basing that on his own experience?

Q. (By Mr. F. W. Lyon): On your own experience in your business?

A. Well, on Exhibit C or 22 actually we have found it to be a little faster.

Q. Can you tell why that is?

A. Well, we did not have the crimping operation that is necessary on Exhibit 11.

Q. In other words, you had extra operations, did you, on the cap type?

A. That's right.

Mr. Mason: May it be understood that my objection to this testimony as constituting an attack on the utility of the patent goes to this line of testimony?

The Court: Let the record so show.

Mr. F. W. Lyon: The witness previously identified a jig. [244]

Q. (By Mr. F. W. Lyon): This is that jig, is it? A. That's right.

(Testimony of George H. Finkle.)

Mr. F. W. Lyon: I would like to offer this in evidence as defendant's next in number.

The Court: In evidence.

The Clerk: That will be Defendant's Exhibit P.

Mr. F. W. Lyon: You may cross-examine.

Cross-Examination

By Mr. Mason:

Q. Mr. Finkle, you have made a demonstration in court of assembling a part of a clamp. You did not complete the clamp? A. No.

Q. You merely inserted two pins and a spreader through a hole in the body?

A. That's right.

Q. Do you know about how long it took you to do that?

A. Well, I know that I am much slower than the girl that is doing it all day long.

Q. As I understand it, you were a part of the F. & H. Manufacturing Company, which was the predecessor to the Wedgelock Company?

A. That's right.

Q. You assembled clamps in the manner you have demonstrated? [245] A. That's right.

Q. That company went into bankruptcy?

A. That's right.

Q. And Mr. Finkle, Donald Finkle, the present defendant, purchased the assets in bankruptcy?

A. That's right.

Q. You are now employed by Mr. Donald Finkle?

(Testimony of George H. Finkle.)

A. Well, I am now employed by the Wedglock Corporation.

Q. When did it become a corporation?

A. January 1, 1947, or 2nd.

The Court: Of this year?

The Witness: That's right.

Q. It is continuing the business that Mr. Finkle as the Wedglock Company had previously carried on? A. That's right.

Mr. Mason: Your Honor, please, I think I should move to file a supplemental bill, since the defendant has changed its status since the case was instituted here. I did not know about that.

The Court: An amendment will be allowed. There is no prejudice.

Mr. Mason: That is all.

### Redirect Examination

By Mr. F. W. Lyon:

Q. Just one question: How many fasteners of any type [246] can a girl assemble in an ordinary eight-hour day?

A. Well, the operations are slightly different. The stringing operation which I demonstrated, the insertion of the two center wires with a spreader on the jig, like Exhibit P, we call that a stringing operation, and they will do around 3,000 units a day.

The Court: How many girls would finish them?

The Witness: We have a very small crew now.



(Testimony of George H. Finkle.)

The Court: How many will one girl finish?

The Witness: 3,000.

The Court: Oh, that was one.

Q. (By Mr. F. W. Lyon): How many can they make of the type of Exhibit 11 in a day?

A. Well, the clamping operation there, which is the taking of what we call the string unit, which is composed of the two center wires and a washer, then the adding of the spring, one or two washers on the bottom cup and spreader, they will do 2,000 or less, depending upon the dexterity of the girl.

Q. That 3,000 figure which you gave was completely assembling a clamp such as Exhibit C, I think it is?

A. No. That was just the stringing operation, which I demonstrated here, the insertion of the center wires.

Q. How long would it take to completely assemble the clamp? How many could they complete in a day? [247]

A. The other, the final clamping operation, that is the compressing of the spring and putting on the cap and inserting the top spreader, I think they do around a thousand a day in eight hours; 1,000 to 1,500. I would have to verify that.

Q. In other words, the positioning of the spreader and pins in the device is a very rapid operation compared to the final locking up operation of compressing the spring? A. That's right.

Mr. F. W. Lyon: That is all.

(Testimony of George H. Finkle.)

Recross-Examination

By Mr. Mason:

Q. Now, just what operation do you include in what you call the stringing operation, which I believe is the operation you said the girl could do 3,000 in a day?

A. That is in taking up the two center wires and inserting it in the jig, placing the T between the center wires and slipping the body over that unit and extracting it from the unit and laying it in the tray. That is it.

Q. In other words, just the operation which you performed this afternoon?      A. That's right.

Q. Now, in this other operation relating to Exhibit 11, just what did you say that the girl would do in doing 2,000?

A. Well, she has the unit of the two center wires here, together with one washer. She puts that into a clamp, a clamp [248] that is capable of compressing the spring. She lays on the spring, then a washer, then inserts—no, pardon me—then she compresses the spring, which leaves an opening that the T can be inserted into, and then a washer is placed on and then the cap placed on and the unit released.

Q. That is a much more complete operation than this stringing operation?      A. That's right.

Q. How many hours a day do they work?

A. Well, it is an eight-hour day. They do have 20 minutes of rest period.

(Testimony of George H. Finkle.)

Q. Are you testifying as to what an expert operator would do, or just an ordinary operator?

A. I am talking about an expert operator.

Q. Have you kept any shop records on that?

A. We have.

Q. Do you have those with you, do you?

A. No.

Mr. Mason: That is all.

### Redirect Examination

By Mr. F. W. Lyon:

Q. After you have made up this sub-assembly, to finish the clamp you have to have another operation?

A. That is right.

Q. That is all? [249]

A. We have two other operations.

Q. What are those?

A. Well, we have to insert the sub-assembly into the body; that is as in Exhibit 11. We would insert the plunger or thimble-shaped unit, and then we would insert the sub-assembly. Then it is taken over and is crimped. The assembly is one operation and the crimping is another.

Mr. F. W. Lyon: That is all.

Mr. Mason: That is all.

The Court: That is all.

(Witness excused.)

Mr. F. W. Lyon: That is all we have.

The Court: Do both sides rest?



Mr. Mason: I would like to ask Mr. Mattingly a few questions, please.

The Court: Stay right where you are. I think he can answer the few questions from right there.

### HAROLD W. MATTINGLY

recalled as a witness by and on behalf of the plaintiffs, having been previously duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Mason:

Q. Mr. Mattingly, will you refer to the Webb Patent 2,256,634, Exhibit H-8, and state whether or not from your [250] examination of this patent you can tell whether or not if the flange which holds the member 17 and the top of the body were to yield, allowing the member 16 to escape, would there be anything to prevent the pins 22 from escaping from the body?

A. No, sir, there would be nothing to prevent them escaping from the body. The pins and spring would immediately be ejected from the body by the spring.

Q. In other words, the lower end portion of the pins could escape through the opening in this lower member of the bottom of the body?

A. That is correct. The hole 34 through the ring 24 must be large enough to pass the hooked ends of the pins 22 even when they are spread by the cams 32. Otherwise it would be impossible to initially assemble this clamp.

(Testimony of Harold Mattingly.)

Q. And there would not be any lock, as provided by Wallace Patent '408?

A. No, the double lock we referred to comprised—the first lock was the engagement of the engaging ends of the pins with the outer end of the body or the outer surface of the cap, and that is not present in the Webb patent at all. The only lock in the Webb patent is the inner engagement of the flanges of the member 16 and the lips 15 on the body.

Q. Now, in Patent '408, referring to Exhibit 19, isn't it true that the headed ends of pins 20 engage the end cap simultaneously with the engagement of flange 33 with shoulder [251] 16?

A. That is the way it is illustrated in Patent '408.

Q. So that those two stopping elements operate to provide the common function of effecting a double stop?

A. That is correct.

Q. Now, will you refer to Wallace Patent '498, which is the last one we offered in evidence——

The Court: Exhibit 23.

Q. (By Mr. Mason): ——Exhibit 23, and compare that with Wallace Patent '929 and state whether insofar as the cap and spreader assembly of those patents relate to the cap and spreader assembly of Patent '408 there is any material difference.

A. There is no material difference between the cap and spreader and body assembly in Exhibit 23 from that which is shown in Exhibit H-11.

(Testimony of Harold Mattingly.)

The cap serves the function of holding the spreader on the assembly in position to project its stem between the ends of the pins, the projecting ends of the pins, and the opposite side of the spreader abuts against the end wall structure, which is the equivalent of the washer 9—I beg your pardon—it is the equivalent to the end wall structure indicated at 7 in Exhibit H-11. The two assemblies, insofar as the spreader, body and cap are concerned function exactly alike and are constructed exactly alike.

Q. And this patent, Exhibit 23, was cited against the [252] application for the Patent '408, and considered by the Patent Office?

A. It was.

Mr. Mason: That is all.

Mr. F. W. Lyon: I have no cross-examination.

(Witness excused.)

Mr. Mason: Now, I believe there are one or two exhibits, your Honor, which were marked for identification and which have not been offered in evidence. I refer particularly to the catalog, which was referred to quite considerably, and I think it probably should be in evidence.

The Court: It helps the court a little. Of course, I recall Mr. Lyon's statement that it was published a considerable time after.

Mr. Mason: We are not offering it to show the date of invention, but merely as illustrative of the testimony.



The Court: Yes. I saw something in there, I recall.

The Clerk: Exhibit 8 in evidence.

Mr. F. W. Lyon: Your Honor, if there are any exhibits which were identified and not introduced, I will stipulate that any of them may be considered offered in evidence.

Mr. Mason: That is satisfactory.

The Court: All of those exhibits heretofore identified and not received will now be received in evidence.

\* \* \* \* \*

[Endorsed]: No. 11761. United States Circuit Court of Appeals for the Ninth Circuit. Herman H. Helbush and Monogram Manufacturing Co., a corporation, Appellants, vs. Donald H. Finkle, doing business as Wedgelock Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 17, 1947.

/s/ PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11761

HERMAN H. HELBUSH and MONOGRAM  
MANUFACTURING CO., a corporation,  
Plaintifffffs,

vs.

DONALD H. FINKLE, doing business as  
WEDGELOCK COMPANY,  
Defendants.

APPELLANTS' CONCISE STATEMENT OF  
POINTS ON APPEAL UNDER RULE 19 (6)

Plaintiffs-appellants make the following statement of the points on which they intend to rely on the appeal:

1. The Trial Court erred in failing to make findings of fact to support the judgment of non-infringement.

2. The Trial Court erred in failing to make findings of fact in accordance with the evidence.

3. The Trial Court erred in holding that defendants have not infringed claim 11 of Patent 2,365,787.

4. The Trial Court erred in holding that defendants have not infringed claims 1 and 2 of Patent 2,364,408.

5. The Trial Court erred in failing to apply the law of patent claim interpretation as stated by the Court in *Reinharts vs. Caterpillar Tractor Co.*, and by the Supreme Court in *Smith vs. Snow*.

6. The Trial Court erred, with respect to claim 11 of Patent 2,365,787, in reading into the claim an element not recited in the claim, and not necessary to novelty or operability.

7. The Trial Court erred, with respect to claims 1 and 2 of Patent 2,364,408, in reading into the claims an element not recited in the claims, which the claims expressly preclude, which is not necessary to novelty or operability and, most important, which is not even included in the specific disclosure of the patent drawings and specification.

8. The Trial Court erred in failing to apply the law of mechanical equivalence.

9. The Trial Court erred in holding that defendants avoided infringement by the simple expedient of calling an equivalent part by a different name.

10. The Trial Court erred in awarding attorneys' fees to defendants when there was no charge or showing of bad faith on the part of plaintiffs and when, according to the terms of the patent grants there was every valid reason for plaintiffs to believe defendants infringe.

11. The Trial Court erred in failing to hold claim 11 of Patent 2,365,787 valid and infringed.



12. The Trial Court erred in failing to hold claims 1 and 2 of Patent 2,364,408 valid and infringed.

Dated this 8th day of October, 1947.

MASON & GRAHAM,  
/s/ COLLINS MASON,  
Attorneys for Plaintiffs-Appellants.

Received copy of the within Statement this 9th day of ..... 1947.

/s/ FREDERICK W. LYON,  
Attorneys for Defendants.

[Endorsed]: Filed Oct. 7, 1947.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AMENDING APPELLANTS'  
DESIGNATION OF PORTIONS OF REC-  
ORD ON APPEAL UNDER RULE 19 (6)

It Is Hereby Stipulated by and between the parties to this action that appellants' designation of portions of record on appeal under Rule 19 (6) shall be amended to include, in Item 21 thereof, defendants' Exhibit H-8, being United States Letters Patent No. 2,256,634, and that this stipulation shall be included in the printed record on appeal.

Dated this 17th day of December, 1947.

MASON & GRAHAM,  
/s/ COLLINS MASON,  
Attorneys for Plaintiffs-  
Appellants.

LYON & LYON,  
/s/ FREDERICK W. LYON,  
Attorneys for Defendants-  
Appellees.

It Is So Ordered:

/s/ FRANCIS A. GARRECHT,  
Judge of the U. S. Circuit  
Court of Appeals.

[Endorsed]: Filed Dec. 19, 1947.

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No. 11761

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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HERMAN H. HELBUSH and MONOGRAM MANUFACTURING  
Co., a corporation,

*Appellants,*

*vs.*

DONALD H. FINKLE, doing business as Wedgelock Com-  
pany,

*Appellee.*

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APPELLANTS' OPENING BRIEF.

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MASON & GRAHAM,  
COLLINS MASON,  
WILLIAM R. GRAHAM,  
811 West Seventh Street, Los Angeles 14,  
*Attorneys for Appellants.*





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No. 11761  
IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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HERMAN H. HELBUSH and MONOGRAM MANUFACTURING  
Co., a corporation,

*Appellants,*

*vs.*

DONALD H. FINKLE, doing business as Wedgelock Com-  
pany,

*Appellee.*

---

APPELLANTS' OPENING BRIEF.

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This is an appeal from a final judgment of the District Court of the United States for the Southern District of California, Central Division, dismissing appellants' action for infringement of claim 11 of United States Letters Patent 2,365,787, issued to Wallace [Ex. 1, II, 277\*], and claims 1 and 2 of United States Letters Patent 2,364,408, issued to Wallace [Ex. 2, II, 283]. The District Court dismissed the action upon the ground that no infringement had been committed by the appellee. The Court did not render any opinion.

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\*Herein the Roman numeral refers to the volume of the record and is followed by the page number.



### **Jurisdiction.**

No question of jurisdiction or pleading is raised by this appeal.

The complaint alleges [Par. III, I, 3] and the answer admits [Par. 1, I, 6] that the suit arises under the patent laws of the United States, of which the District Courts of the United States have exclusive original jurisdiction (Judicial Code, Sec. 24(7), 28 U. S. C. A. 41). Jurisdiction to review the appealed judgment is conferred by Sec. 128(a) of the Judicial Code (28 U. S. C. A. 225). No question of venue is involved.

The appealed judgment was filed and entered on May 20, 1947 [I. 33]. Motion for a new trial was filed by appellants on May 28, 1947 [I, 35], and order of the District Court denying appellants' motion for new trial was entered on June 25, 1947 [I, 55]. The notice of appeal was filed September 23, 1947 [I, 55], within three months of entry of the order denying appellants' motion for a new trial (28 U. S. C. A. 230).

### **Statement of Case.**

Appellants' original complaint named only appellee, Donald H. Finkle, doing business as Wedgelock Company, as defendant.

The original complaint alleges infringement of claim 11 of United States Letters Patent 2,365,787; claims 1 and 2 of United States Letters Patent 2,364,408; and claims 1 to 7, inclusive, of United States Letters Patent 2,320,493, issued to and owned by appellant, Herman H. Helbush, and exclusively licensed to appellant, Monogram Manufacturing Company. The patents are for improvements in sheet metal clamps.

On September 13, 1946, said defendant filed his answer, denying infringement [Par. 4, I, 7] and alleged that the patents were irregularly granted [Par. 5, I, 7]; that Frank C. Wallace, the inventor named in the patents, was not the first inventor of the patented subject matter [Par. 7, I, 7]; that the patented subject matter had been invented by others prior to Wallace's invention [Par. 8, I, 8]; that in view of the state of the prior art the patents cannot be interpreted to cover appellee's device [Par. 9, I, 9]; that appellants so limited the patent claims during prosecution before the Patent Office that they cannot be construed to cover appellee's device [Par. 10, I, 10]; that the patents do not involve invention [Par. 11, I, 10]; and that the description of the invention is not sufficiently clear to comply with the patent statutes [Par. 12, I, 10]. With his answer, said appellee also filed a counterclaim charging appellant, Monogram Manufacturing Company, with infringement of said appellee's United States Letters Patent 2,393,088.

By stipulation, appellants dismissed their action in so far as Patent 2,320,493 was concerned and said appellee dismissed his counterclaim for infringement of Patent 2,393,088 [I, 19].

Appellee, Wedglock Company, a corporation, was brought into the action as a defendant by supplemental complaint filed pursuant to stipulation of the parties [I, 20].

Sheet metal clamps are devices used as temporary rivets to hold metal sheets together while the sheets are being riveted together. For instance, the sheets to form an entire airplane wing will be assembled and held together by hundreds of the clamps while the riveting operation pro-

ceeds. The clamps are removed as the permanent rivets are applied [I, 101].

There are two types of sheet metal clamps. One, the *single clamping pin* or "Cleco" type typified by Exhibit 13, is shown by Blanc patent 2,136,875 [Ex. H5, II, 307] and DeMooy patent 2,159,655 [Ex. H6, II, 313]. The other is the *two clamping pin* type exemplified by the patents in suit, which are improvements upon the clamps shown by prior art patents: British 413,403 of 1933 [Ex. H3, II, 297], British 443,683 of 1936 [Ex. H4, II, 313], and DeMooy 2,269,188 [Ex. H7, II, 317]. The latter patents were cited and considered by the Patent Office during prosecution of the application for patent in suit 2,365,787.

The accused devices, Exhibits 11 and 12, are of the two-pin type.

The principal general difference between the single-pin type and the two-pin type is that the single-pin type has a single clamping pin which reciprocates through a small hole in the outer end of a cylindrical clamp body relative to a cam element, while the two-pin type has two substantially parallel, flexible clamping pins which reciprocate through a small hole in the body relative to a stationary spreader mounted between them. The use of two pins with a spreader between them presented a difficult and costly assembly problem not presented by the single-pin type.

The single-pin type has the disadvantage that it affords only a one-sided and unbalanced clamping action and is relatively hard to apply to and remove from the holes in the work sheets [I, 79], while the two-pin type pro-



vides an even and balanced clamping action and is relatively easy to insert in and remove from the holes in the work sheets [I, 79, 80].

It is important to bear in mind that, although the more desirable two-pin type clamp was invented three years before the less desirable single-pin type, the two-pin type remained in the paper patent stage and never went into commercial use until the improvements of the first Wallace patent in suit 2,365,787 were disclosed, while the single-pin type did go into universal use. That was because neither of the prior art patents on the two-pin type disclosed a structure which could be assembled cheaply enough to render it commercially feasible. Even the single-pin clamps were selling for over 20 cents each [I, 169] when the Wallace clamp was first introduced in 1941. The Wallace improvements of patent 2,365,787 enabled the more desirable two-pin clamps to be assembled in two-thirds less time [I, 94] and made to sell for as low as 6 cents each [I. 94].

As soon as the Wallace improvements were introduced, the two-pin clamps promptly went into universal use and completely supplanted the one-pin type [I, 94]. Since millions of these clamps are used, the value of this saving of over 300% in price provided a tremendous saving to the public. For instance, appellant, Monogram, alone sold over fifty million of the Wallace clamps up to the trial of this action [I, 93], which represented a saving of over \$7,000,000 to the public.

The principal difficulties in assembling two-pin type clamps were these: the clamping pins must slide through a small hole in the outer end of the clamp body, and, to effect engagement with the work sheets, the pins must

have enlarged outer ends. The spreader must be mounted in the body and project outwardly through the small hole between the enlarged ends of the pins. The enlarged pin ends with the spreader between them cannot pass through the small hole in the end of the body at the same time. Thus to assemble the clamp a tedious and costly series of assembly steps was necessary.

The Wallace invention of patent in suit 2,365,787 overcame those assembly difficulties by what may now appear to be a very simple improvement. Wallace provided a separate and attachable end cap for the clamp body, to house the spreader and to provide a work-engaging surface for the body. This cap made possible two simple and economical methods of assembly: (1) if the body has an integral end wall, the clamping pins may be inserted together from the *inner end* of the body, and then the spreader can be inserted from the *outer end*, after which the end cap is crimped onto the body; or (2) if the clamp body is open at its outer end, the pins, spring and spreader may be mounted in the cap as a complete sub-assembly unit, such as Exhibit E, and then the unit can be inserted from the outer end of the body, after which the end cap may be crimped onto the body. The accused clamps are assembled by the latter method.

The next major improvements upon the two-pin type clamp was also contributed by Wallace, by patent in suit 2,364,408. By this improvement, Wallace overcame a long existing personal injury hazard in the use of sheet

metal clamps. Very strong springs are necessarily used in these clamps, and the clamping pins would often break off. When this happened, the spring would propel the clamp parts through the air, causing them to strike a workman and seriously injure him.

By his improvement of patent 2,364,408, Wallace eliminated this hazard by providing *double safety stops* for the pins. Those double stops shared the spring stresses and even if one stop should fail, the other stop will prevent the clamp from flying apart. This improved clamp immediately became the one in general use, and it was also copied by appellees.

Subsequent to applying for his patent in suit 2,365,787, Wallace contributed another, but relatively minor, improvement. This improvement consisted of making the spreader rotatable in the clamp body to avoid twist-off of the pins in the work sheets. In a former case against appellees' predecessor, *Monogram Mfg. Co. et al. v. F & H Mfg. Co.*, 144 F. (2d) 412, this Court held the patents in that suit invalid upon the ground of anticipation. Mention is made of this prior case here so that the issues in that case may not be confused with the issues here. There the subject matter was entirely different, and here patent in suit 2,365,787 was applied for long prior to either of the patents involved in that suit.

It is unfortunate that the Trial Court rendered judgment in the instant case without any opinion or without any findings which clearly indicate the Court's reasons



for the holding of non-infringement. The patent claims in issue clearly read upon the accused devices and the claims are not properly subject to any other interpretation. Only Finding 24 [I, 29] throws any light upon the Court's interpretation. By that finding, it might appear that the Court construed the claims in issue of both patents to be necessarily limited to a structure in which the clamp body has an integral end wall in addition to an attached end cap. But claim 11 of patent 2,365,787 does not contain any such element, and such an end wall is not at all necessary either to novelty or utility. And it is even more impossible to construe claims 1 and 2 of patent 2,364,408 as including such an end wall, because the claims do not contain any such element, *and the patent disclosure does not even show any such element.*

Moreover, even if the claims in issue could be construed to include such a body end wall in addition to the cap, by the doctrine of equivalence, the accused devices clearly also have an end wall. The only function of an end wall is to provide something to prevent the end of the spring from bearing directly against the spreader. For this purpose a washer is provided in the accused devices as well as in the specific embodiment of patent 2,364,408 shown in the patent drawings.

Both patents received thorough examination by and prosecution before the Patent Office. *The prior art patents selected by appellees' expert as being the most pertinent were cited and considered by the Patent Office.*

### Specification of Errors.

1. The Trial Judge's interpretation of the patent claims and structures involved is contrary to the law and facts.

This error is raised by paragraphs 3-9 of appellant's concise statement of points on appeal [I, 273], reproduced in the appendix hereto.

2. The Trial Court abused its discretionary powers in awarding attorneys' fees to appellees, when there is no showing or indication of bad faith on the part of appellants.

This error is raised by paragraph 10 of appellants' concise statement of points on appeal.

3. The Trial Court erred in failing to find the patent claims in issue valid and infringed.

This error is raised by paragraphs 11 and 12 of appellants' concise statement of points on appeal.

## SUMMARY OF ARGUMENT.

### POINT 1.

**The Trial Judge's Interpretation of the Patent Claims in Issue, and of the Accused Device, Is Contrary to the Law and to the Facts.**

(a) The essence of the invention of patent in suit 2,365,787 is the combination wherein the clamp body has a separate end cap attached to it so as to render possible two economical methods of assembling the clamping pins and the stationary spreader in the body.

(b) Claim 11 of patent 2,365,787 reads squarely upon the accused clamps as exemplified by Exhibits 11 and 12 and the claim is not subject to any other interpretation.

(c) The findings of fact leave it uncertain as to the interpretation which the Trial Court placed upon claim 11 and upon the accused devices in order to conclude that there was no infringement.

(d) The prior art is not pertinent to the improvements of claim 11.

(e) The Trial Court's interpretation of claim 11 is contrary to the law as applied by this Court.

(f) The essence of the invention of claims 1 and 2 of patent in suit 2,364,408 is the combination which provides double safety stops to eliminate hazards of personal injuries to workmen resulting from clamps flying apart.

(g) Claims 1 and 2 of patent 2,364,408 read squarely upon the accused device as exemplified by Exhibit 12 and are not subject to any other interpretation.



(h) The prior art fails to disclose the improvements of claims 1 and 2 of patent 2,364,408.

(i) Finding 25 does not relate to any matter of substance.

## **POINT 2.**

**It Is Improper to Award Attorneys' Fees to a Prevailing Party in a Patent Case Unless There Is Some Showing of Bad Faith on the Part of the Losing Party.**

(a) Such an allowance, in the absence of bad faith, is contrary to the statute and to the Constitution.

(b) In enacting the amendment to 35 U. S. C. A. 70 in 1946, Congress did not intend that attorneys' fees should be allowed in patent cases as a general thing.

(c) The practice in allowing attorneys' fees in patent cases should follow the practice relating to allowance of multiple damages in patent suits.

## **POINT 3.**

**The Trial Court Should Have Found the Patents in Suit Valid and Infringed.**

(a) Although both patents in suit relate to improvements in an old art, they disclose meritorious advances and are entitled to liberal treatment.

(b) By all accepted rules for determining invention and according to the law of claim interpretation as applied by this Court, the patents in suit are valid and infringed.

## ARGUMENT.

### POINT 1.

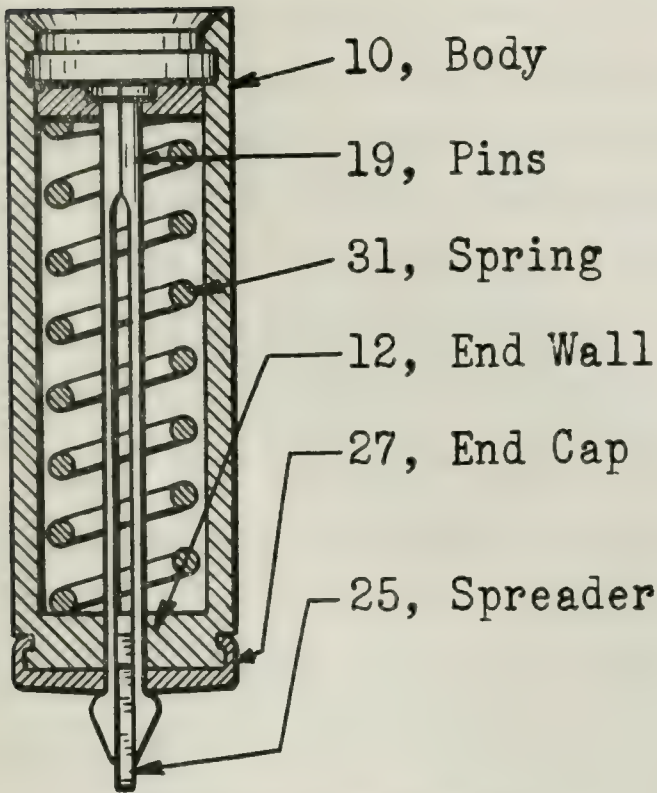
**The Trial Judge's Interpretation of the Patent Claims in Issue, and of the Accused Devices, Is Contrary to the Law and to the Facts.**

**Claim 11 of Patent 2,365,787 [Ex. 1, II, 277.]**

Appellees' devices, as exemplified by Exhibits 11 and 12, are charged to infringe claim 11 of patent 2,365,787. Exhibit 11-A is a cut-open specimen of Exhibit 11, and Exhibit 17 is a drawing of the device of Exhibit 11. Exhibit 12-A is a cut-open specimen of Exhibit 12, and Exhibit 18 is a drawing of the device of Exhibit 12.

For convenient reference, the specific embodiment of the invention illustrated in the patent drawings, is shown in Plate 1 next following.

Plate 1



Clamp as specifically  
shown in drawing of  
Patent No. 2,365,787

By reference to Plate 1, it will be seen that the specific clamp shown in the patent drawing includes a cylindrical body (10) having crimped onto its outer end a separate end cap (27) which has a hole through its center. Reciprocally mounted in the body there is what is referred to in claim 11 as a “retaining member,” consisting of a pair of clamping pins or prongs (19) having enlarged outer ends. A spring (31) urges the pins into the body. The outer end portion of the clamping pins move and extend through the hole in the end cap. To spread the clamping pins apart, a T-shaped spreader bar (25) is held between their outer end portions, the cross-portion of the bar being held by the end cap against movement as the pins move outwardly.



In the *specific example of the invention shown in the patent*, the body has an integral end wall (12) provided with a transverse slot in which the inner end of the spreader bar is positioned. This wall, however, merely provides an abutment for the spring [I, 163, 169] and obviously may be omitted if desired, or an ordinary washer, such as the washer (9) shown in Plates 2, 3 and 4 may be substituted [I, 163, 169]. *This end wall (12) is not included as an element of claim 11.*

This patented combination, including an attached end cap, solved an old problem, one which had been serious enough to keep the *two-pin* type of sheet metal clamp off the market and to keep the cost of sheet metal clamps up to over 20 cents each.

The intricacies and difficulties of assembling a two-pin type of clamp without having such an attached end cap are outlined by witness Mattingly at I, 109-114 and illustrated in Exhibit 22. As witness Livingston testified [I, 91] *it requires three times as long to assemble a clamp which does not have such an end cap as it does to assemble a clamp having an end cap.*

The great extent to which the use of a separate end cap has facilitated assembly of the accused clamps is related by Mr. Mattingly at I, 106-109, 115-119 and is illustrated in drawing Exhibits 20 and 21.

In fact, the evidence shows that *it is impossible to assemble the accused clamps without using the separate*

*end cap* taught by patent 2,365,787. See witness Mattingly's testimony at I, 161 as follows:

“Q. Mr. Mattingly, could you make a sub-assembly such as defendant's Exhibit E and mount it on the body of Exhibit 11 without using the body and cap combination such as is used in Exhibit 11 or the drawing of the exhibit, Exhibit 17? A. No; you could not. The structure shown in Exhibit 17, as I pointed out, includes the body portion in which the upper end has—the inner end, as we have referred to it here, has the inter-turned flange to engage that thimble; so that it is essential that the assembly of the spring, pin, cap, and spreader be made in that body from the outer end of the body, and you would have to have your body capable of allowing all of that assembly to pass inwardly from the bottom end and then your cap to secure that assembly to the body.”

Also see Mr. Mattingly's testimony at I, 117, as follows:

“Q. Now, does the end cap 11 in Exhibit 17 provide the same advantages in assembly as the end cap which you have described in Exhibit 16? A. Yes. It allows the assembly to be put together with greater ease than if no cap was used, and, in fact, without a cap this particular structure illustrated in Exhibit 17 could not be assembled.”

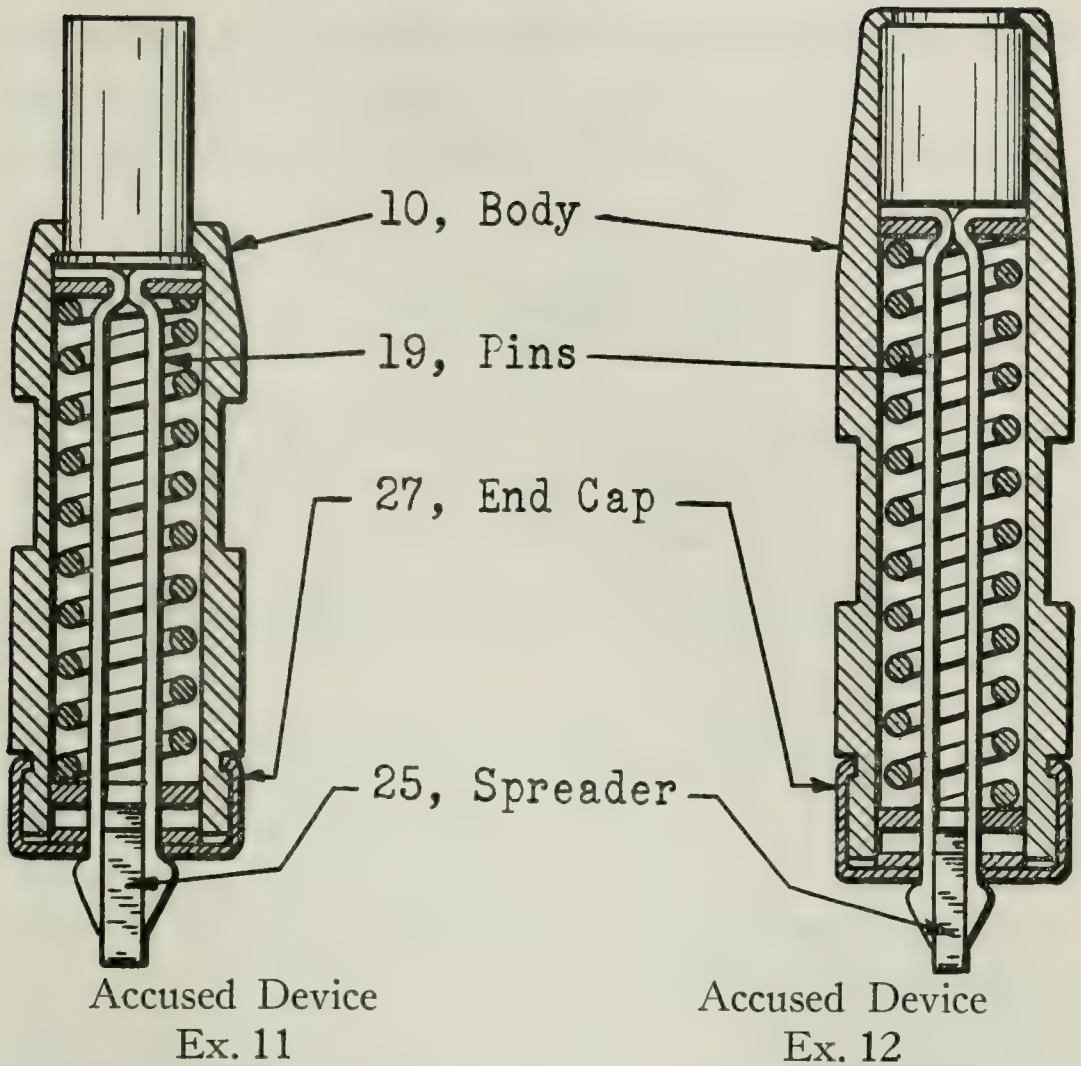
Although appellees' expert, Mr. Hackstaff, first claimed that he could assemble the accused clamps without using

a separate end cap, cross-examination developed that he could not [I, 247-252]. After a recess, appellees' counsel attempted, by re-direct examination [I, 260-262], to show that the accused clamps could be assembled without using a separate end cap, and had the witness produce a pencil sketch [Ex. M, II, 345], to illustrate, but, as the sketch shows, the witness had to materially change the structure in order to effect an assembly without the separate cap. The sketch of Exhibit M shows a clamp structure of questionable operability or utility, one quite different from the accused devices and one in which the double safety stop feature of patent 2,364,408 could not be obtained.

**The Accused Devices, Exhibits 11 and 12, Infringe Claim 11  
of Patent 2,365,787.**

In Plate 2 next following, the accused devices are shown and, next following the plate, claim 11 is quoted. Like reference numerals are given to the elements in the plate and in the claim (in so far as the elements are included in the claim), those being the reference numerals used in the patent specification.





Accused Device  
Ex. 11

Accused Device  
Ex. 12

"11. A clamp for holding perforated sheets together in superposed relation, comprising a cylindrical body (10), a laterally flexible retaining member (19) reciprocally mounted in the body for protraction and retraction through the outer end of the body, a spreader bar (25) having lateral sliding engagement with the retaining member, said spreader having an angularly disposed inner end portion, and means for holding the spreader bar against outward longitudinal movement relative to the body, the last-named means consisting of a cover cap (27) having a cylindrical skirt secured to the outer end portion of the body periphery and an end wall whose inner surface provides an abutment for the angular portion of the spreader bar and whose outer surface provides a sheet-engaging portion."

It is clear, therefore, that claim 11 of patent 2,365,787 reads squarely upon the accused devices just as definitely as it reads upon the patent disclosure. See also expert Mattingly's testimony reading claim 11 upon the accused devices [I, 120-129].

**The Findings Leave It Uncertain as to the Trial Court's Interpretation of Claim 11 and of the Accused Devices.**

Upon what ground the Trial Judge distinguished the accused devices from the structure defined by the claim is left very much in doubt by the findings.

Finding 24, the only pertinent finding [I, 29], reads as follows:

"24. That the clamps manufactured, used and sold by the defendants, Donald H. Finkle and the Wedglock Company, a corporation, do not include an end cap for holding a T-shaped spreader on the outside end wall of the body of said clamp and against the end wall."

That finding might indicate that the Trial Judge held claim 11 to be necessarily limited to a structure wherein the body has an end wall in addition to the end cap, except for the fact that the Trial Judge *refused to adopt* finding numbered 23 [I, 29] *proposed* by appellees, which *proposed* finding reads as follows:

"23. That in view of the above set forth prior patents, and the ruling of the Patent Office as above set forth, the patent in suit, United States Patent No. 2,365,787, must be limited in its scope to include a body member with an integral end wall and a cover cap surrounding said end wall and holding a T-shaped spreader on the outside of said end wall and inside of said cover cap."

The Trial Judge's refusal to adopt that finding is, according to the authorities, equivalent to a contrary finding.

"A failure of the court to find that the words had acquired a secondary meaning was a finding that the words had not acquired such meaning. *Dektor v. Overbrook National Bank of Philadelphia, et al.*, 77 F. (2d) 491, 492; 64 C. J. 1079."

*Leland J. Wilhartz v. Turco Products, Inc.*, .....  
F. (2d) ..... (C. C. A. 7), decided Dec. 23,  
1947.

Obviously, claim 11 does not include, as an element, a body end wall in addition to an end cap. There is no evidence that the patented device is inoperative unless it has an end wall in addition to the cap—indeed, the evidence is to the contrary [I, 169].

#### No Prior Art Discloses the Invention of Claim 11.

There is certainly no disclosure in the prior art which places any such limitation upon claim 11, because *no prior art shows an attached end cap of any kind for any purpose*. In fact, it appears that the Trial Court recognized that the prior art failed to place any such limitation upon claim 11, because the Court *rejected* proposed findings numbered 18-23 [I, 27, 28] to that effect.

The Trial Court also refused to find that the claim was so limited during prosecution before the Patent Office [I, 27, proposed finding 17].

The only patents *earlier* than the filing of the application for the Wallace patent in suit 2,365,787 are:

British patent 413,403 [Ex. H-3]

British patent 443,683 [Ex. H-4]

DeMooy 2,269,188 [Ex. H-7]



of which appellees' expert selected DeMooy 2,269,188 [Ex. H-7] as being the most pertinent [I, 235]. This DeMooy patent as well as the British patents were cited and considered by the Patent Office. The most that these patents disclose, however, are clamps of the double pin type *generally*, but *in none is there a separate end cap* at all, so that all lack the very essence of the combination of the Wallace patent. Therefore, the prior art totally fails to limit claim 11.

**The Trial Court's Interpretation of Claim 11 of Patent 2,365,787 Is Contrary to the Law as Applied by This Court.**

By omitting an end wall as an element of claim 11, the patentee presented and obtained a claim which was not so limited.

It is significant that *other* claims (not in issue) of the patent are, by their language, expressly limited to a structure which does include a body end wall in addition to a cap (see claim 4).

It is well settled patent law that:

“A patentee may, however, describe all the devices in his machine or manufacture, and instead of claiming all or any particular portion of them in combination, may claim so much of the described mechanism as produces a particular described result.”

“Walker on Patents,” Dellers Edition, page 1697.

As stated in *Motion Picture Patents v. Universal Film Mfg. Co.*, 243 U. S. 510, 61 L. Ed. 871 (at L. Ed. p. 876):

“These (the claims) so mark where the progress claimed by the patent begins and where it ends that

they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute.”

It is also settled law, in this and other circuits, that, in construing a patent, it is improper to read into a claim limitations which it does not express, particularly when such limitations are neither necessary to operability, novelty or utility, and when the claim does not use language such as “of the character described” to refer to limitations shown in the specification. If a claim is ambiguous or uncertain (which is not true of claim 11), reference may be had to the specification to throw light upon it, but simply because an element might be disclosed in the specific embodiment of the invention shown in the patent drawing, is no valid reason why any claim not specifying the element should be considered as including it.

In the Ninth Circuit Court of Appeals case of *Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 F. (2d) 628, the patent involved a tractor. The specification of the patent described it as a “frameless” tractor, although the particular claim of the patent in issue made no mention of the structure being frameless. In holding that the claim could not be interpreted to include an element which

it did not recite, even though the element was described in the specification, the Court said (at p. 633):

“Appellant contends that the tractor described in the Wickersham specification is a ‘frameless’ tractor, and that the accused tractor is not of that type and, therefore, cannot be said to infringe the Wickersham patent. This contention must fail. Wickersham’s invention is defined, not by the specification, but by the claims of his patent. *Smith v. Snow*, 294 U. S. 1, 11, 55 S. Ct. 279, 79 L. Ed. 721; *Altoona Publix Theatres v. American Tri-Ergon Corporation*, 294 U. S. 477, 487, 55 S. Ct. 455, 79 L. Ed. 1005; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, *supra*, 210 U. S. 405, at page 419, 28 S. Ct. 748, 52 L. Ed. 1122. There is in the claims no mention of a ‘frameless’ tractor. That expression is merely appellant’s characterization of a tractor having, instead of the usual frame, a central body member comprising a combined engine and transmission case, as described above.”

In the Supreme Court case of *Smith v. Snow*, 294 U. S. 1, 79 L. Ed. 721, the patent involved a method for incubating eggs. The patent specification stated that, in the preferred method of carrying out the invention, the eggs should be arranged in a particular manner in the machine, although the patent claims in issue did not include any such requirement. The defendant urged that the claims must be interpreted to be limited to the particular manner of arranging the eggs described in the specification, although the claims did not recite this element.



In denying this construction of the claim, the Supreme Court said (at L. Ed. p. 728):

“We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor’s method, and that he conceived that particular way described as the best one. But he is not confined to that particular mode of use since the claims of the patent, not its specifications, measure the invention. Paper Bag Patent case (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*), 210 U. S. 405, 419, 52 L. Ed. 1122, 1128, 28 S. Ct. 748; *McCarthy v. Lehigh Valley R. Co.*, 160 U. S. 110, 116, 40 L. Ed. 358, 361, 16 S. Ct. 240; *Winans v. Denmead*, 5 How. 330, 343, 14 L. Ed. 717, 722. While the claims of a patent may incorporate the specifications or drawings by reference, see *Snow v. Lake Shore & M. S. R. Co.*, 121 U. S. 617, 630, 30 L. Ed. 1004, 1008, 7 S. Ct. 1343, and thus limit the patent to the form described in the specifications, it is not necessary to embrace in the claims or describe in the specifications all possible forms in which the claimed principle may be reduced to practice.”

As is the case here, in *Smith v. Snow, supra*, the patent contained other claims which did specifically include the limitations urged by the respondent for claim 1 of the patent there in suit, and in commenting upon this the Supreme Court said (at L. Ed. p. 729):

“The omission of these requirements from claim 1 is the more pointed as the other claims of the patent speak in particular of a power-driven fan . . . Thus, by striking and obviously intended con-

trast with other claims, claim 1 covers broadly the essential elements of the Smith invention.”

It is submitted, therefore, that if the Trial Court did construe claim 11 as being necessarily limited to the inclusion of a body end wall in addition to the cap element, such an interpretation constituted error.

**The Trial Court's Interpretation Does Not Give Any Effect to the Doctrine of Equivalence.**

Even if claim 11 could be properly construed as being limited to the inclusion of a body end wall in addition to the cap, such an interpretation would not enable appellee to escape infringement, because, in each of Exhibits 11 and 12, there is an element which is the full mechanical equivalent of the body end wall shown in the specific embodiment of patent 2,365,787 illustrated in the patent drawing. That is the washer 9 contained in Exhibits 11 and 12. This washer is interposed between the inner end of the spring and the spreader and performs the same function as does the end wall in the specific embodiment shown in the patent. See the testimony of expert Mattingly [I, 168, 169] as follows:

“Does it make any difference, Mr. Mattingly, in the functions of this clamp whether the spring in the clamp exerts its pressure on an end wall, such as 12 in Exhibit 16, or whether it exerts it on a washer such as Wb in Figure 11 or Figure 12—I mean in Exhibit 11 or 12, or those drawing Exhibits 17 or 18?

“No, the only function to be performed is to provide something against which that end of the spring may bear and push to exert its force, to draw the pins into the body.”

If one appropriates the substance of a patented invention, he is an infringer, even though he might call the parts of his device by names different from those used in the patent claims or might use equivalent parts providing the same functions in the same way.

“Furthermore, it appears from the evidence that appellant’s tractor has, instead of the usual frame, a central body member substantially identical with that described in the Wickersham specification. Hence, if Wickersham is a ‘frameless’ tractor, so also is the tractor sold by appellant.”

*Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 F. (2d) 628, at p. 634 (C. C. A. 9).

See, also:

*Jay v. Suetter*, 32 F. (2d) 879 (C. C. A. 9).

Appellants do not contend otherwise than that the patents here in suit are for meritorious improvements in an old art, but it is well settled that:

“A patent for a meritorious improvement in an old art is entitled to liberal treatment. *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U. S. 45, 63, 43 S. Ct. 322, 67 L. Ed. 523.”

*Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 F. (2d) 628, at p. 636.

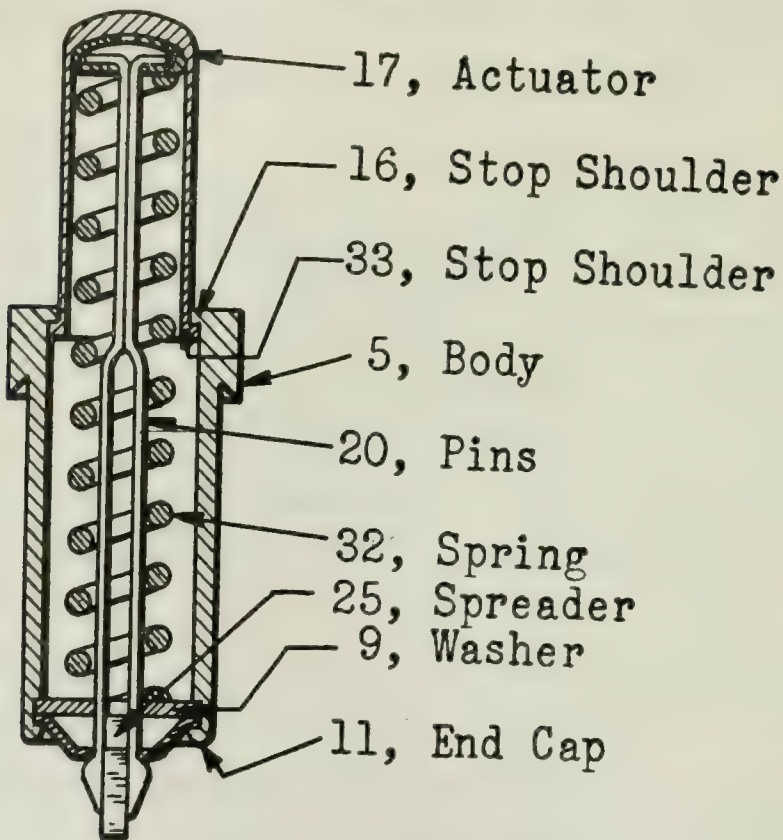


Claims 1 and 2 of Patent 2,364,408 [Ex. 2, II, 283].

Exhibit 11 is the only one of the accused clamps charged to infringe those claims.

For convenient reference, the preferred embodiment of the invention illustrated in the patent drawings is shown in Plate 3, next following.

Plate 3



Clamp as specifically  
shown in drawing of  
Patent No. 2,364,408

The improvements contributed by the invention of this patent afford important *double safety stops* to prevent injury to workmen caused by clamps flying apart.

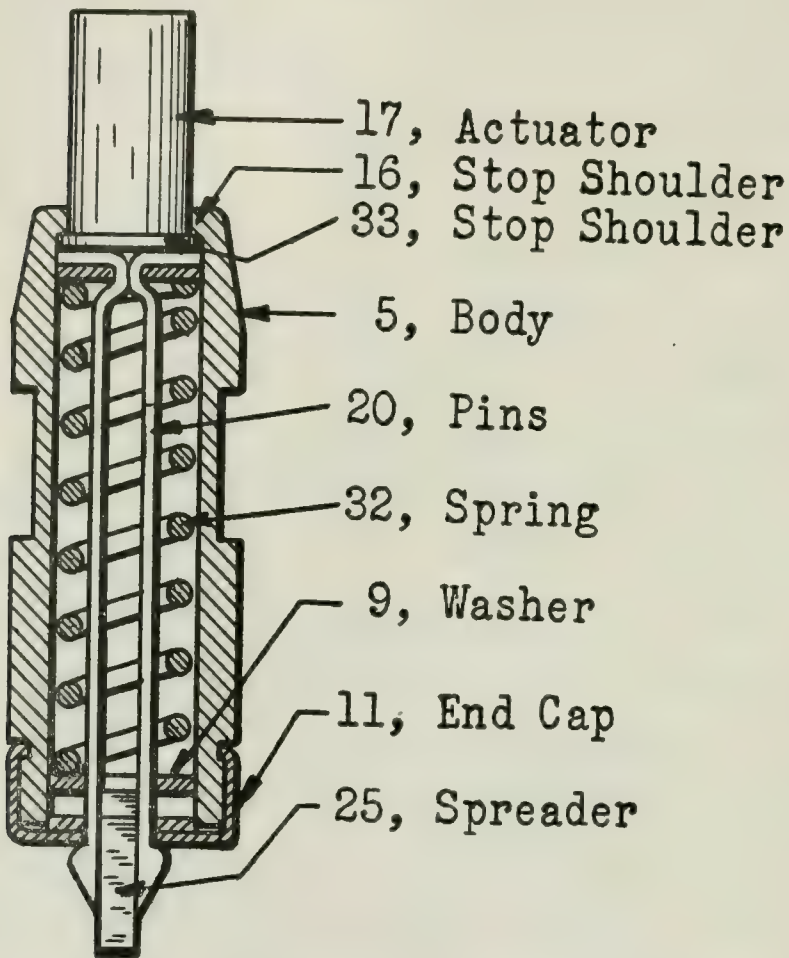
The clamp body (5) is open at both ends, and, at the outer end, there is an attached end cap (11) having a

hole through its center to pass the outer ends of the clamping pins (20). (The clamping pin assembly is referred to in the claims as a “plunger”). The pins are urged into the body by a spring (32). In lieu of having an outer end wall, a washer (9) is mounted in the outer end of the body, and, between the washer and end cap, a spreader bar (25) is mounted, the spreader bar having an outer end portion extending outwardly through the hole in the end cap between the clamping pins. To force the plunger or clamping pins outwardly against the action of the spring, a “tool operated means” or plunger-actuating member (17) is reciprocally mounted in the inner end of the body. One of the safety stops is provided by the cooperating shoulders 16 (on the inner end of the body), and 33 (on the inner end of the actuating member 17), and the other safety stop is provided by engagement of the enlarged outer ends of the pins (with the spreader between them) against the end cap, I, 129. When the spring retracts the clamping pins, the two safety stops function simultaneously to take and share the stress imposed by the spring and, if either stop should give way, the other stop still prevents the clamp from flying apart.

In this clamp, the end cap element of the combination is essential and important because it is utterly *impossible* to assemble the clamp without the separate end cap. The cooperating shoulders (16) and (33) prevent assembly of the clamp from the *inner* end of the body.

Exhibit 11 is again reproduced in Plate 4 for convenient reference and, in this plate, the parts of the clamp are given the reference numerals used in the patent.

Plate 4



Defendants' Device  
Exhibit 11

The claims read squarely upon Exhibit 11. This is shown by the following full quotation of claim 2 of patent 2,364,408, the reference numerals identifying the parts of the accused clamp being shown after the corresponding elements of the claim, those reference numerals being the ones used in the patent specification.



“A sheet metal clamp, comprising, in combination, a cylindrical body (5)

and end cap (11) mounted on the body in position closing the outer end thereof, said cap presenting an opening therethrough and a work-engaging outer surface,

a plunger (20) reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening,

a spreader member having a laterally projecting inner end portion (25) disposed in the cap and an outer end portion projecting outwardly through said opening in engagement with the work-engaging member,

an inwardly disposed flange (16) on the inner surface of the body adjacent its inner end,

a coil spring (32) in the body around and retractively engaging the plunger and tool-operated means for protracting the plunger against the pressure of said spring comprising a plunger engaging member (17) reciprocally mounted in and projecting from the inner end of the body for manual engagement, said member having a relatively increased diameter inner end portion engageable against said flange when the plunger is in fully retracted position.”

Claim 1 of patent 2,364,408 is like claim 2 except that it more specifically describes the cap as having a “dished inner portion” and describes the spreader as being “T-shaped,” so that claim 1, like claim 2, also reads upon Exhibit 11.

The testimony of appellants' expert Mattingly, reading claims 1 and 2 upon Exhibit 11, is found in the record at I, 129-139.

By what interpretation the Trial Court held those claims not to be infringed, is certainly not at all understandable. Even if the Court read into the claims the presence of an end wall in addition to the cap, to the same extent that patent 2,364,408 can be said to have an "end wall," so does the accused clamp, Exhibit 11, have an end wall. That is, if the washer (9) of patent 2,364,408 constitutes an "end wall" the *identical* washer (9) of the accused clamp also constitutes an end wall.

The clear fact is, however, that neither of those *claims* includes an end wall in addition to the cap. On the contrary, the claims expressly *exclude* an end wall, because they definitely recite that the cap is secured on the body "*in position closing the outer end thereof.*" Obviously if there were an integral end wall, it would close the outer end of the body and would not leave it open to be closed by the cap.

**The Prior Art Does Not Limit Claims 1 and 2 of  
Patent 2,364,408.**

By its refusal to adopt proposed findings of fact 27-34 [I, 29-31] it appears that the Trial Court fully recognized that the prior art offered by appellee failed to limit the combinations of those claims.

The art offered against this patent consists of Webb 2,256,634 [Ex. H8, II, 323], which was cited and con-

sidered by the Patent Office during prosecution of the application for patent 2,364,408, and Wallace 2,266,929 [Ex. H11, II, 341]. While this particular Wallace patent was not cited by the Patent Office, another Wallace patent, 2,292,498 [Ex. 23, II, 291], was cited and considered, and this latter patent is the same as patent 2,266,929 insofar as the purposes of its citation were concerned—that is, the Wallace patent was cited merely to show the use of an end cap and both of those Wallace patents show the same end cap structure [I, 270].

The Webb patent shows something corresponding to the cooperating shoulders (33) and (16) of the Wallace patent in suit 2,364,408, but it does not use the type of clamping pins employing a spreader therebetween nor does it show the Wallace end cap feature [I, 269]. In other words, one could not provide in Webb the second safety stop of the patent in suit without completely redesigning the Webb structure in accordance with the teachings of the patent in suit.

There is nothing in either Webb or Wallace 2,266,929 or Wallace 2,292,498 which suggests the combination of two safety stops as taught by patent in suit 2,364,408.

The law of claim interpretation referred to hereinbefore is equally applicable to the Court's interpretation of claims 1 and 2. In fact, it is more applicable because, in the case of patent 2,364,408, the accused device, Exhibit 11, has every element shown even in the specific embodiment illustrated in the drawings of patent 2,364,408. No resort to the doctrine of equivalence nor any liberal interpretation is necessary.



**Finding 25 Is Without Substance.**

Finding 25 reads as follows:

“That the clamps manufactured, used, and sold by defendants have a two-piece body with the T-shaped spreader positioned inside of the body.”

The accused devices, as well as the devices disclosed in the patents in suit, all have a body to which a separate end cap is attached, and the spreader is held in the body by the end cap.

*It is therefore immaterial whether one describes either device as having a “two-piece body” or whether one describes either device as having a body to which an end cap is attached. In substance, both definitions mean absolutely the same thing.*

Certainly one does not avoid infringement by using different language to describe his infringing device. Therefore, if the Trial Court adopted Finding 25 as any valid reason for finding non-infringement, it unquestionably committed error.

## POINT 2.

**It Is Improper to Award Attorneys' Fees to a Prevailing Party in a Patent Case Unless There Is Some Showing of Bad Faith on the Part of the Losing Party.**

The Trial Court awarded \$500 attorneys' fees to appellee, despite the fact that *there was no showing or indication of bad faith on the part of appellants.*

It is submitted that it is important that this Court state its interpretation and application of the 1946 amendment to 35 U. S. C. A. 70, which amendment permits a Court, *in its discretion*, to award reasonable attorneys' fees to a prevailing party in a patent case. If such an allowance were made a general thing in patent cases, it would defeat the purposes of the patent statute and would be directly contrary to the intent of the Constitutional provision upon which the statute is based.

When the Government grants a patent right to an inventor, the inventor should not be placed in a position of having to face bankruptcy if, in good faith, he asks a Court to interpret his patent. Nevertheless the action of the Trial Court in assessing attorneys' fees in this case follows such a harsh policy, because there is absolutely no element of bad faith on the part of appellants, and the patent claims certainly appear to cover the accused devices. In other words, appellants had every reason to believe their case against appellees to be well founded, and appellees have not produced any evidence showing the contrary. In fact, it does not appear that appellees even seriously disputed infringement.

**Congress Did Not Intend That Award of Attorneys' Fees  
Would Be Made an Ordinary Thing.**

The statutory provision is new, and we find only two reported cases interpreting it. In one of those cases, *Lincoln Electric Co. v. Linde Air Products Co.*, 74 Fed. Supp. 293 (D. C., N. D., Ohio, E. D.), the District Court refused to award attorneys' fees, stating its interpretation of the statute as follows:

"It is apparent from the wording of the statute, and its history, that an award of attorneys' fees should not be made in an ordinary case. The court is invested with discretionary power *where it is necessary to prevent gross injustice* (emphasis added). The case at bar presents a situation which is not unusual in patent matters. This court finds no special circumstances of gross injustice . . . This court does not consider that the action by the plaintiff was absolutely unwarranted or unreasonable. Since the award asked by the defendant is contrary to long established practice, a clear showing of the conditions indicated in the statute must be made to entitle the applicant to the relief sought. The circumstances and conditions surrounding the parties in this litigation do not warrant an award of attorneys' fees to the prevailing party."

That interpretation appears to be completely in accord with the purposes and intentions of Congress in enacting the legislation. For instance, Senate Report No. 1503,



relating to this legislation, contains the following statement of its purpose:

“By the second amendment, the provision relating to attorney’s fees is made discretionary with the court. It is not contemplated that the recovery of attorneys’ fees will become an ordinary thing in patent suits, but the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be royalty. The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer.”

The other reported case is *National Brass Co. v. Michigan Hardware Co.*, 76 U. S. P. Q. 186, ..... F. (2d) ..... (decided January 7, 1948), which also denied attorneys’ fees where no bad faith was shown.

#### **The Practice Should Follow the Practice in Allowing or Refusing Multiple Damages.**

It is submitted that no award of attorneys’ fees should be made in a patent case *unless there is a clear showing of bad faith on the part of the losing party*. In other words, it is submitted that the practice should substantially follow the practice of the courts in allowing or refusing multiple damages for wilful infringement. An exhaustive study of the cases in this connection shows that only in rare cases, where there has been a showing of extreme bad faith on the part of the defendant, have multiple damages been allowed.

**There Is No Showing of Bad Faith in This Case.**

*There is absolutely no showing in this case of any bad faith whatsoever on the part of appellants or either of them.*

As shown by the patent art and the evidence, appellants have been foremost in improving and developing sheet metal clamps to a point where the public may purchase the most desirable type of clamp at a nominal price. The Patent Office granted the patents in suit after thorough prosecution and they contain claims which, in accordance with the rules of claim interpretation laid down by this Court, read squarely upon the accused device. Appellees have been persistent infringers, having copied first the improvements of patent in suit 2,365,787 and having then copied the improvements of patent in suit 2,364,408. If appellants were not entitled to ask the Court to hear their case against appellees without being penalized by an award of attorneys' fees, it is hard to imagine any case in which a patentee would be entitled to invoke the aid of the courts without fear of penalty.

POINT 3.

**The Trial Court Should Have Found the Patents in  
Suit Valid and Infringed.**

Having found no infringement, the Trial Court did not pass upon validity of either patent in suit.

It is submitted, however, that this Court may and should hold the patents valid and infringed without the necessity of remanding the case.

The infringement is clear and, in this case, there are present all the elements which increase the presumption of validity flowing from the grant of the patents after thorough prosecution before the Patent Office. There is an absence of prior art suggesting the novel combinations of the claims. There is the fact that the Patent Office granted the patents after considering the prior art patents which appellees' expert selected as the most pertinent. There is the unrefuted evidence that the patented clamps promptly supplanted all others. There is the unrefuted evidence also that the inventions effected a reduction in the cost of clamps of over 300%, resulting in a saving to the public of several million dollars. Thus, although the patents only relate to improvements in an old art, the improvements were of substantial merit and the patents are entitled to liberal interpretation (*Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U. S. 45, 63, 67 L. Ed. 523.) However, in this case, it is not necessary to invoke any liberal interpretation to find infringement.



Conclusion.

Appellants respectfully submit, therefore, that the appealed judgment should be reversed and the patents in suit found valid and infringed.

Respectfully submitted,

MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

*Attorneys for Appellants.*







## APPENDIX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Herman H. Helbush and Monogram Manufacturing Co., a corporation, Plaintiffs, vs. Donald H. Finkle, doing business as Wedgelock Company, Defendants. No. 11761.

### APPELLANTS' CONCISE STATEMENT OF POINTS ON APPEAL UNDER RULE 19(6).

Plaintiffs'appellants make the following statement of the points on which they intend to rely on the appeal:

1. The Trial Court erred in failing to make findings of fact to support the judgment of non-infringement.

2. The Trial Court erred in failing to make findings of fact in accordance with the evidence.

3. The Trial Court erred in holding that defendants have not infringed claim 11 of Patent 2,365,787.

4. The Trial Court erred in holding that defendants have not infringed claims 1 and 2 of Patent 2,364,408.

5. The Trial Court erred in failing to apply the law of patent claim interpretation as stated by the Court in *Reinharts vs. Caterpillar Co.*, and by the Supreme Court in *Smith vs. Snow*.

6. The Trial Court erred, with respect to claim 11 of Patent 2,365,787, in reading into the claim an element not recited in the claim, and not necessary to novelty or operability.

7. The Trial Court erred, with respect to claims 1 and 2 of Patent 2,364,408, in reading into the claims an element not recited in the claims, which the claims ex-

pressly preclude, which is not necessary to novelty or operability and, most important, which is not even included in the specific disclosure of the patent drawings and specification.

8. The Trial Court erred in failing to apply the law of mechanical equivalence.

9. The Trial Court erred in holding that defendants avoided infringement by the simple expedient of calling an equivalent part by a different name.

10. The Trial Court erred in awarding attorneys' fees to defendants when there was no charge or showing of bad faith on the part of plaintiffs and when, according to the terms of the patent grants there was every valid reason for plaintiffs to believe defendants infringe.

11. The Trial Court erred in failing to hold claim 11 of Patent 2,365,787 valid and infringed.

12. The Trial Court erred in failing to hold claims 1 and 2 of Patent 2,364,408 valid and infringed.

Dated this 8th day of October, 1947.

MASON & GRAHAM,  
/s/ COLLINS MASON,  
*Attorneys for Plaintiffs-Appellants.*

Received copy of the within Statement this 9th day of  
....., 1947.

/s/ FREDERICK W. LYON,  
*Attorneys for Defendants.*

[Endorsed]: Filed Oct. 7. 1947. [Rep. Tr. pp. 273-275.]

No. 11761.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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HERMAN H. HELBUSH and MONOGRAM MANUFACTURING  
Co., a corporation,

*Appellants,*

*vs.*

DONALD H. FINKLE, doing business as WEDGELOCK COM-  
PANY,

*Appellee.*

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APPELLEE'S BRIEF.

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FILED

APR 14 1948

PAUL P. O'BRIEN,  
CLERK

LYON & LYON,

FREDERICK W. LYON,

811 West Seventh Street, Los Angeles 14,

*Attorneys for Appellee.*





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No. 11761.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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HERMAN H. HELBUSH and MONOGRAM MANUFACTURING  
Co., a corporation,

*Appellants,*

*vs.*

DONALD H. FINKLE, doing business as WEDGELOCK COM-  
PANY,

*Appellee.*

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APPELLEE'S BRIEF.

---

Plaintiffs, Herman H. Helbush and Monogram Manufacturing Co., have appealed from a judgment of the District Court dismissing an action based upon a claim of infringement of claim 11 of United States Letters Patent No. 2,365,787, and claims 1 and 2 of United States Letters Patent No. 2,364,408. Originally the complaint included a charge of infringement of claims 1 to 7, inclusive, of United States Letters Patent No. 2,320,493.

Defendant, Donald H. Finkle, filed an answer denying infringement and alleging that the patents were invalid on several grounds and counterclaimed charging the Monogram Manufacturing Co. with infringement of United States Letters Patent No. 2,393,088, owned by defendant. By stipulation the charge of infringement as to patent No. 2,320,493 and defendant's counterclaim



were dismissed. Defendant Wedglock Company, a corporation, was brought into the action as a defendant by supplemental complaint filed pursuant to stipulation of the parties [R. 20].

### **Jurisdiction.**

This suit arises under the Patent Laws of the United States as it involves questions of validity and infringement of said Letters Patent (Judicial Code, § 24(7), 28 U.S.C.A. 41).

The appealed judgment was filed and entered on May 20, 1943 [R. 33]. Motion for a new trial was filed by plaintiffs on May 28, 1947 [R. 35] and an Order of the District Court denying plaintiffs' Motion for a New Trial was entered on June 25, 1947 [R. 55]. Notice of Appeal was filed September 23, 1947 [R. 55], within three months of the entry of the Order Denying Plaintiffs' Motion for a New Trial (28 U.S.C.A. 230).

### **Statement of the Case.**

The District Court found that plaintiff-appellant, Herman H. Helbush, was and still is the owner of all right and title in United States Letters Patent No. 2,365,787, and in United States Letters Patent No. 2,364,408, and that the plaintiff-appellant, Monogram Manufacturing Co., has the exclusive right to manufacture, use and sell the inventions of said United States Letters Patent [R. 25, 26].

The Court further found that the defendants, Donald H. Finkle and Wedglock Company, engaged in the manufacture and sale of sheet metal clamps prior to or subsequent to the issuance of said Letters Patent [R. 26] and that said clamps do not constitute infringement of said Letters Patent [R. 26, 32, 34].

The defenses pleaded by appellees to both patents are:

1. Noninfringement [Amend. Answer, R. 7];
2. That Frank C. Wallace was not the original or first inventor of that which is alleged to be patented in the respective patents, or any material or substantial part thereof, and that all substantial parts thereof had been described and patented in the prior patents set forth in Paragraph 7 of the Amended Answer [R. 7-8];
3. That in view of the state of the art at and before the alleged inventions of the patents the claim or claims of said patent or patents cannot now be so interpreted as to bring within their purview as an infringement thereof any clamp manufactured by defendants [R. 9];
4. That both patents are invalid and void because that which is disclosed and claimed therein did not require invention in view of the state of the art existing at the time of the alleged invention thereof by Wallace [R. 10].

The District Court found that appellees did not infringe either of the patents in suit, but did not pass upon the other defenses [R. 26, 32, 34].

The first Wallace patent in suit, No. 2,365,787, was granted December 26, 1944, on an application filed April 7, 1941. The second Wallace patent, No. 2,364,408, was granted December 5, 1944, on an application filed April 9, 1943.\*

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\*Hereinafter these patents will be referred to as the "787" and "408" patents; *i.e.*, by the last three digits of their numbers.

In the aircraft industry, the external metal sheets or plates forming the skin of a plane must be riveted together. The plates are superposed upon one another over the internal framework. Registering rivet holes are provided in the superposed sheets and framework. In some instances the rivet holes in the sheets and framework are punched or drilled in advance of assembly; in other instances such registering rivet holes are punched or drilled in the sheets and in the framework at the time the sheets are brought into position on the framework. The sheets are riveted together and to the framework. In order to provide for proper riveting of the sheets and framework, it is necessary to hold in exact coaxial alignment the rivet holes of the sheets and framework while the permanent rivets are inserted and secured. Originally, in this industry, a nut and bolt were used for this purpose. The Wallace patents are concerned solely with temporary clamps for holding the sheets upon the framework while the permanent rivets are inserted and fastened.

Several years prior to the recent war various types of removable clamps or temporary rivets were used both in this country and abroad.

*Cf.* Patent to Le Blanc, No. 2,136,875 [Exhibit H-5, R. 307].

British Patent to A. T. S. Co., Limited, No. 413,403 [Exhibit H-3, R. 297].

British patent to Rocroy, No. 443,683 [Exhibit H-4, R. 303].

Patent to De Mooy, No. 2,159,655 [Exhibit H-6, R. 313].

Patent to De Mooy, No. 2,269,188 [Exhibit H-7, R. 317].



Patent to Webb, No. 2,256,634 [Exhibit H-8, R. 323].

Patent to Rogers, No. 2,276,344 [Exhibit H-9, R. 331].

While the two Wallace patents refer to the devices described and claimed therein as a “clamp” and a “sheet metal clamp” the terms “temporary rivet,” “skin clamp” and “sheet fastener” are used by the witnesses as synonymous in referring to removable fastening devices used for holding rivet holes in superposed sheets in coaxial alignment.

The advantages of such a clamp or temporary rivet over the ordinary nut and bolt, lie in the fact that the temporary rivet can be readily and quickly inserted and removed by a single operator at the exterior of the work and without the loss of time otherwise incident to the threading together and separation of the nut and bolt, which also requires two operators, one on each side of the sheets which are to be held together (*Monogram Mfg. Co. v. F & H Mfg. Co.*, 144 F. 2d 412).

Neither of the Wallace patents makes any claim to being more than improvements on existing clamps for temporary rivets (Appellants’ Brief 5, 6).

The clamp illustrated and described in patent No. 787 is admittedly only an improvement upon prior art patents, best illustrated by the British patent to Rocroy, No. 443,-683, Exhibit H-4, and the United States patent No. 2,269,188 to De Mooy, Exhibit H-7. The 787 patent and these two prior patents, Exhibits H-4 and H-7, describe a clamp comprised of a body member within which is a slidably mounted retaining pin. This retaining pin extends outwardly through a hole at one end of the body.

A spreader is positioned to spread the halves of the retaining pin apart. The inner end of the retaining pin carries a means for retracting the pin against the end wall of the body adjacent to the hole. The retaining pin has projections or enlargements which cannot pass through the hole because the combination of the spreader extending outwardly from the body and the halves of the pin and the projections are larger than the hole. In order to insert the clamp into the registering rivet holes of the sheets of material to be held together or to withdraw it therefrom it is necessary to force the ends of the retaining pin outwardly from the end of the body until the projections on the pin are extended beyond the spreader. Thereupon the halves of the pin can spring together so as to allow them to be inserted within a rivet hole. Retracting the pin against the end of the body causes the halves to be spread by the spreader and the projections hooked over the edges of the sheets surrounding the rivet holes, thus securely clamping the sheets between the projections upon the pin and the end wall of the body.

The only physical difference between the disclosures of the Rocroy patent, Exhibit H-4, and the De Mooy patent, Exhibit H-7, is that the means for retracting the pins to hold them in a clamping position comprise a nut threaded upon the pin in the Rocroy clamp which is tightened up to pull the pins against the end of the body. In the De-Mooy patent there is a spring replacing the nut and engaging the inner end of the body and a cap upon the pin to yieldably retract the pin into the body.

The Wallace 787 patent uses a spring similar to De Mooy rather than the nut of Rocroy. The only other difference is that Wallace places his spreader in a slot on the exterior of the end wall of his body and covers the

spreader with a cover cap 27. Rocroy and De Mooy do not have this cover cap 27. In De Mooy the spreader is held on the exterior of the end wall by merely crimping the edges of the slit over the spreader [R. 319, Col. 1, line 52, to Col. 2, line 7]. The purpose of the cover cap 27 in the Wallace patent 787 is to provide "a minimum contact surface . . . to minimize the chance of marring the surface of the work." [R. 279, Col. 2, lines 18-20.] Nowhere does the Wallace patent 787 claim any other purpose for or advantage in the cap 27.

In the 787 patent Wallace's claim of invention is thus restricted to the provision of this end cover cap 27 over Rocroy and De Mooy. All the other elements of his clamp were old in substantially the same clamp and acting in the same manner and for the same purpose.

The Wallace patent 408 is similar to the Wallace patent 787 and Rocroy and De Mooy, Exhibits H-4 and H-7, with one exception. This patent, after describing identically the same device as the three above mentioned patents, adds another element which comprises a thimble 17 mounted to form a cover over the retaining pin and its spring. Inwardly extending from the inner surface of the body is a shoulder 16 which acts as a stop to limit the outward movement of the thimble 17. The purpose of Wallace in the alleged invention of the 408 patent was to prevent the retaining pins from being hurled outwardly from the body if they should so break that the projections would no longer limit their movement through the holes in the end wall. This was accomplished by a shoulder upon the thimble 17 which engaged a shoulder 16 upon the inner bore of the body which struck against each other if the retaining pins broke. However, this cooperation of a shoulder upon a thimble with a shoulder



upon the body was not new with Wallace. It is disclosed in the patent to Webb, No. 2,256,634, Exhibit H-8 [R. 323]. This Webb patent discloses a cap 16 upon the retaining pin which has a shoulder to engage a shoulder extending inwardly from the body [R. 325, Col. 2, line 44, to R. 326, Col. 1, line 1]. Wallace 408 discloses nothing new over Rocroy, De Mooy and Webb except the cover cap 11 to engage the work.

At the trial appellants elected to stand upon claim 11 of the 787 patent and claims 1 and 2 of the 408 patent. The appealed judgment is based upon these claims [R. 34].

The claim in suit of the 787 patent specifies a combination of the following elements or parts:

- (a) A cylindrical body (round body 10);
- (b) A laterally flexible retaining member reciprocatively mounted in the body for protraction and retraction through the outer end of the body;
- (c) A spreader bar having lateral sliding engagement with the retaining member, said spreader having an angular disposed inner end portion;
- (d) Means for holding the spreader bar against outwardly longitudinal movement relative to the body consisting of a cover cap having a cylindrical skirt secured to the outer end portions of the body periphery;
- (e) And an end wall whose inner surface provides an abutment for the angular portion of the spreader bar and whose outer surface provides a sheet engaging portion.

While this claim does not specifically disclose or specify that a spring shall be incorporated in the clamp to yield-

ably hold the retaining member retracted, a spring is necessary to the described operation of the device and must be read into this claim so that an operative combination is disclosed and specified. There would be no clamping action of the specified elements without the coil spring 31.

The District Court interpreted claim 11 and decided that the patented invention consisted of a body 10 having an end wall 12 and a cap 27 holding a spreader (cross bar 25) between said end wall 12 and said cap 27. This interpretation of the Court is disclosed in Findings of Fact 24 and 25 [R. 29] wherein the Court found that defendants' clamps do not have an end wall on the body and the clamps had two-piece bodies; *i. e.*, a cylindrical tube closed by a cap at one end. Plaintiffs' expert testified:

"Q. There is no difference in putting those two parts together than there is in putting the bottom on an ordinary tin can?

\* \* \* \* \*

"A. That is a fairly good statement of it; yes."  
[R. 153-154.]

Obviously as defendants' clamps [illustrated by Exhibits 11 and 12] do not have an end wall 12 and only a cap they do not infringe.

"Every element of a combination claim for an apparatus \* \* \* is conclusively presumed to be material. The omission of one element, \* \* \* of the claim avoids infringement of that claim, whether or not the omitted element, operation, or step is essential to the combination." (*Haynes Stellite Co. v. Osage Metal Co., Inc.*, 110 F. 2d 11, 14 (C.C.A. 10).)

As Wallace 787 only describes a body having an end wall 12 (contrasted with a hollow tube like defendants'), the Court correctly limited the term "a cylindrical body" of claim 11 to a cylindrical body having an end wall 12.

The claims of the 408 patent in suit are claims 1 and 2. Appellants have chosen claim 2 as typical. This claim specifies a combination of the following elements or parts:

- (a) A cylindrical body;
- (b) An end cap mounted on the body in position closing the outer end thereof;
- (c) Said cap presenting an opening therethrough and a work-engaging outer surface;
- (d) A plunger reciprocally mounted in the body, said plunger having a work-engaging member protractable and retractable through said opening;
- (e) A spreader member having a laterally projecting inner end portion disposed in the cap and an outer end portion projecting outwardly through said opening in engagement with the work-engaging member;
- (f) An inwardly disposed flange on the inner surface of the body adjacent its inner end;
- (g) A coil spring in the body around and retractively engaging the plunger and tool operated means for protracting the plunger against the pressure of said spring;
- (h) Comprising a plunger-engaging member reciprocally mounted in and projecting from the inner end of the body for manual engagement, said member having a relatively increased diameter inner end portion engageable against said flange when the plunger is in fully retracted position.



As with respect to the 787 patent, the Court construed “a cylindrical body” in this 408 patent to specify a body having a wall inside of the cap. This end wall is described as a ring member 9 [R. 285, col. 1, lines 53-55]. Only clamps similar to Exhibit 11 are charged to infringe the 408 patent (Appellants’ Opening Brief, p. 26). These clamps do not have an end wall inside of the cap. The Court therefore found that they did not infringe the claims of the 408 patent. *Haynes Stellite Co. v. Osage Metal Co.*, *supra*.

The Final Judgment herein awarded defendants “reasonable attorneys’ fees herein adjudged to be \$500.00.” The record in this case shows that the principal defendant (Donald H. Finkle) has been continually harassed by law suits by the plaintiffs. He has had to defend against four patents owned by plaintiffs. These are the two patents here in suit and the two patents found invalid by this Circuit Court. *Monogram Mfg. Co. v. F & H Mfg. Co.*, 144 F. 2d 412.

## SUMMARY OF ARGUMENT.

1. BOTH PATENTS IN SUIT ARE LIMITED TO A CLAMP HAVING AN INNER END WALL ON THE BODY AND AN END COVER CAP HOLDING THE SPREADER IN PLACE BETWEEN THE END WALL AND THE COVER CAP.

As neither of appellees' clamps has an end wall and has only an end cap, they do not infringe either patent in suit [Findings of Fact 12-15, R. 26].

2. THERE IS NOTHING INVENTIVE DISCLOSED IN THE 787 PATENT OVER THE PRIOR PATENTS TO ROCROY AND DE MOOY.

The 787 patent mechanically in function and parts is identical with the patents to Rocroy and De Mooy.

3. THE CLAIMS OF THE PATENT 408 ARE INVALID AS THEY CONSTITUTE NOTHING BUT A COLLECTION OF OLD ELEMENTS OPERATING IN THEIR WELL-KNOWN MANNER TO ACCOMPLISH NO NEW RESULTS.

The 408 patent has no new elements or functions and does not describe a patentable combination.

4. CLAIM 11 OF THE 787 PATENT IS INVALID AS THE SUBJECT MATTER OF SAID CLAIM WAS IN PUBLIC USE AND ON SALE MORE THAN ONE YEAR BEFORE THE FIRST DISCLOSURE THEREOF TO THE PATENT OFFICE.
5. THE AWARD OF ATTORNEYS' FEES TO THE DEFENDANTS IN THIS CASE WAS NOT AN ABUSE OF DISCRETION.

## ARGUMENT.

**Both Parties in Suit Are Limited to a Clamp Having an End Wall on the Body and an End Cover Cap Holding the Spreader in Place Between the End Wall and the Cover Cap.**

To interpret the claims of the two patents in suit the District Court had to first determine what (if anything) was new in the patented combination. In both patents the Court determined that the only new thing was a body having an end wall thereon with the spreader mounted on the outside of that end wall and held in position by a cover cap. The 787 patent describes a clamp having the following elements:

- (1) A body member in which is slidably mounted
- (2) A flexible retaining pin with
- (3) A spreader held between the legs of the retaining pin to hold them apart, and
- (4) A spring to urge the pin inwardly of the body so that
- (5) Projections on the ends of the halves of the retaining pin extending from the body will clamp perforated sheets between the projections and the end of the body.

There can be no dispute that such a combination was old in the art [Rocroy, Exhibit H-4, and De Mooy, Exhibit H-7]. Both Rocroy and De Mooy clearly disclose such a combination. Therefore, the difference between the clamp of the 787 patent and the clamps of these two prior patents must be found in the manner of holding the spreader on the body. Rocroy does not fully disclose how he holds the spreader in position. He merely states



that it shall be fixed in the body "Between the arms 4 and 5, there is fitted into the slot 3 a slide 11 of inverted T-shape of which the cross piece or base 12 is secured to a sleeve 13 capable of sliding on the screwed rod," [R. 304, lines 52-56].

De Mooy describes the positioning of his spreader as attached to the end wall of the body by being positioned in a slot wherein it is held by having the lips of the slot peened over; that is, bent over the edges of the slot to partially close same [R. 319, col. 1, line 52, to col. 2, line 3]. These two prior patents both show the manner of fixing the spreader upon the body. All that Wallace did was to take the De Mooy fastener and instead of "closing the outer ends of the groove" to hold the spreader in position, he put a round cap member over the cross arms of the T-shaped spreader and crimped this cap upon the sides of the body. He still retained the end wall on his body. The reason for doing this is explained in the patent in suit where he states that the purpose of the cap 27 is to prevent "marring the surface of the work" [R. 279, Col. 2, lines 14-20]. Any ordinary mechanic would understand that a tool of this type should have the end of the body rounded off.

Although the purpose of the end cap as described in the 787 patent is to prevent damage to the work, the testimony clearly shows that there was another purpose in using an end cap in the commercial clamp of appellants. That purpose was to permit the device to be cheaply assembled [R. 89]. Testimony further states that the appellants could not figure out a way of assembling a clamp having a one-piece body (that is, no end cap) that could be constructed sufficiently cheap to compete with their competitors [R. 96-99]. The one-piece body clamp took

the appellants “three times as long to assemble” as the type having a body with an end wall and a spreader and cap on its outside [R. 91-92]. They therefore went to the two-piece body comprising the body with an end wall and a spreader and cap on the outside. By such a construction the appellants were able to insert the retaining pin through the hole in the end of the body member without the use of a jig and then insert the spreader between the legs of the retaining pin on the outside of the body, slip the cap over the spreader and pins and the device would be complete [R. 92]. The difficulty in assembling the one-piece body was that the hole in the wall was not larger than the combined width of the projections on the ends of the retaining pin and it was difficult to insert the spreader and pins from the inside of the body through the end wall [R. 92]. Appellees had no such difficulty. As adequately displayed to the lower court, defendants constructed a jig which could be operated by an inexperienced girl and which permitted the spreader and pins to be inserted from the inside of the body through the end wall obviating the use of an end cap [R. 226]. By the use of this jig appellees assembled all of their clamps [R. 223, 265-268]. Appellants expressly admitted that they could not accomplish this type of assembly and had no jigs to assemble this type of device [R. 99]. Appellees later on developed two clamps, Exhibits 11 and 12, which have an end cap. These are the alleged infringing clamps. This end cap is entirely different and for a different purpose than that of the 787 patent. The purpose of this end cap was to permit the appellees to use a simple tubular shaped body *without any end wall*. This type would be cheaper to construct than a complete body having an end wall. This construction was cheaper as it saved weight in the body

and in the amount of steel necessary. A simple stamping could be made of a cap out of relatively thin steel and this could be crimped to the body to form its end wall. Actually all that appellees did was to construct their body as a two-piece device [Finding of Fact 25, R. 29]. Such a construction is old and well known in forming cylindrical tubes with bottoms such as tin cans [R. 153-154].

Another reason for so constructing appellees' Exhibits 11 and 12 with the two-piece body was that they could be assembled by a subassembly method. The spreader, pins and cap and spring could be assembled as a unit and inserted into the body and the end cap crimped to the body to form the completed tool. The device described in the 787 patent could not be so assembled as there is an end wall 27 upon the body, which would prevent the positioning of the subassembly in the body. To illustrate the correctness of the lower court's decision that defendants' clamps, Exhibits 11 and 12, do not infringe the 787 patent, because they do not have an end wall on the body, all that it is necessary to show is that the subassembly, Exhibit E, actually is a full and complete clamp in itself [R. 147-148] not differing from the older type of defendants' clamp, Exhibit C, in any particular other than the size and shape of the body itself. Appellants' own expert stated: "Yes, I think functionally they are the same." [R. 147.] All of the operating parts of appellees' clamps, Exhibits 11 and 12, are incorporated in Exhibit E. Appellants' expert admitted they were identical in function with the older Exhibit C. Therefore



if Exhibits 11 and 12 infringed the patent in suit, so would Exhibits C and E, and as they do not differ from Rocroy and De Mooy, they either do not infringe or the patent is anticipated. *Killefer Mfg. Co. v. Dinuba Associates, Limited*, 67 F. 2d 362, 366 (C.C.A. 9).

All that has been said heretofore about the 787 patent applies directly to the 408 patent. The only additional elements of the 408 patent that are not included in the 787 patent are the shoulders which prevent the cap from exploding. These are the shoulders 16 extending inwardly from the body and the shoulder upon the cap 17 which engages the shoulders 16 to prevent the cap and retaining pins from being hurled outwardly from the body if the retaining pins break. Appellants have urged that this patent has a double safety feature. Nowhere in this patent, and it cannot be found from the drawings or description, is there any other safety feature than the one just described; that is, the shoulders. The shoulders prevent the cap, spring and retaining pin from being hurled from the body in the direction to the right in the drawings of the patent if the retaining pins break. Nothing could be hurled from the other side. The projections or enlargements 20b on the ends of the retaining pin do not function any differently in this patent than they do in all of the other art. They do not act as a safety lock in any stretch of the imagination. If they are broken, the shoulders will engage and stop the explosion of the tool. Whether or not they are intact the shoulders are the only devices that would prevent an explosion of the tool. These safety shoulders, which are the only pos-

sible novelty in the 408 patent, are clearly described in the Webb patent, Exhibit H-8, wherein he shows a retaining pin in a body which has a cap thereon and a spring to force the retaining pin outwardly from the body. In this patent he clearly describes a shoulder which he calls lips 15 [R. 325, Col. 2, lines 40-43], and a shoulder 20 upon the cap [R. 325, Col. 2, lines 48-51]. This body and cap with the two shoulders are identical in form to the 408 patent and are for the same purpose as that patent. They are there to prevent the cap from moving out of the end of the body [R. 325, Col. 2, line 51, to R. 326, Col. 1, line 1]. The 408 patent differs from Webb, Rocroy and De Mooy in providing an end wall which is rigidly affixed in the body and the 408 patent calls this an end wall or ring member 9 [R. 285, Col. 1, lines 53-55].

This end wall 9 is for the identical purpose of the 787 patent. It was put there to enable the appellants to assemble their clamp. It is not a washer such as the one disclosed in *appellees'* device, Exhibit 11. The washer in *appellees'* device is free and is a mere load member to take the pressure at the end of the spring as can be seen by an examination of cutaway models and Exhibit 11. The end cap is made of comparatively thin material and as the spreader merely floats on this cap, it might cut its way through the end cap if the spring contacted the spreader in an irregular manner. Therefore, a safety washer has been applied to the device. In fact, as the exhibits show, in some clamps the washer was left out. It is not necessary to the operation of *appellees'* clamp. But the end wall permanently affixed is a necessary item to both the patents in suit as otherwise neither patent describes anything new.

## **There Is Nothing Inventive Disclosed in the 787 Patent Over the Prior Patents to Rocroy and De Mooy.**

There is nothing inventive disclosed in the 787 patent over the prior patents to Rocroy and De Mooy [Exhibits H-4 and H-7, R. 303-317]. The 787 patent in suit discloses a clamp which is identical with the prior art patents to Rocroy and De Mooy with one exception. That exception is that over the end wall of the body of these prior patents Wallace has added an end cap for the purpose described in the patent of keeping “a minimum contact surface . . . to minimize the chance of marring the surface of the work.” [R. 279, Col. 2, lines 16-20.]

An examination of the De Mooy patent, Exhibit H-7, discloses that the body (cup shaped housing 10) has an end wall (base 12), a central bore 13 for the retaining pins (retainer 20) with a spreader 15 mounted on the exterior surface of the end wall 12 in a groove 14. The spreader 15 is held in place by closing the outer ends of the groove 14. Comparing this prior patent to the patent in suit, we find that the Wallace 787 patent describes a body 10 having an end wall 12 with a bore therethrough through which is passed the retaining pin 19. On the exterior surface of the end wall 12 of the 787 patent is described a slot 16 into which is inserted the head of the spreader (cross bar 25). To hold this spreader in position in the slot 16 Wallace closes the slot just as does De Mooy. This closure is a cap 27 (end cover cap). The only thing that could possibly be called new in the 787 patent is the device for closing the slot 16. De Mooy teaches that it should be closed by “partly closing the outer ends of the groove.” Wallace closes the slot by completely covering it with a cover



cap. Functionally all the elements of the Wallace 787 patent are found in the De Mooy patent. One closes the slot holding the spreader in position by crimping or peening the slot together, the other by adding a piece of metal called an end cover cap, which is crimped around the end of the body. The body with its end wall, the retaining pin, the spreaders and the spring are identical.

These clamps first came into extensive use with the enormous increase in the aircraft industry during the years 1939-1946. Prior to this there had been practically no use for this type of tool. As shown by the record in this case and the Court's decision in the prior *Monogram* case, both parties entered this industry in 1941. At that time there were clamps on the market. A large number of patents had issued or been applied for upon these simple devices. The appellants set upon the proposition of attempting to secure a monopoly upon the industry. For this purpose they solicited and secured a large number of patents, amongst which are the two patents held invalid in the prior *Monogram* suit, the two patents at issue in this case, Exhibit 23 and Exhibit H-11. Each and every one of these patents is for a trifling difference from the original inventions of Rocroy and De Mooy. At the same time many others secured patents on the same devices. The record discloses patents to A. T. S. Co., Le Blanc, De Mooy, Webb and Rogers [Exhibits H-3, 5, 6, 8 and 9, respectively]. There are also the patent not in evidence but originally declared by appellant to be infringed [R. 3, 4], and the patent to

the appellees [R. 12], which was the substance of the Counterclaim. All of these patents clearly illustrate the principle as defined in *Atlantic Works v. Brady*, 107 U.S. 194, 197, where the Court said:

“The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences.

“The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and

gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.”

This case and the former *Monogram* case fully illustrate that when there is a demand for a device or tool any ordinary mechanic can immediately see dozens of different ways of improving the devices already on the market. In this case Wallace changed the prior patents to Rocroy, De Mooy and Webb only by adding a cover cap over the end wall. This change amounts to nothing more than mechanical skill; in fact, it is a mere selection of an obvious way to close the groove of De Mooy. It is old and well known that a cover cap can close a slot, open end barrel or the ends of a tin can. *Mettler v. Peabody Engineering Corp.*, 77 F. 2d 56, 57 (C.C.A. 9); *Eagle, et al. v. P. & C. Hand Forged Tool Co.*, 74 F. 2d 918 (C.C.A. 9); *Magarian v. Detroit Products Co.*, 128 F. 2d 544 (C.C.A. 9). Mere selection of well-known parts to act in their old well-known manner is not invention.



**The Claims of the Patent 408 Are Invalid as They  
Constitute Nothing But a Collection of Old Ele-  
ments Operating in Their Well-Known Manner  
to Accomplish No New Results.**

The claims of the patent 408 are invalid as lacking invention over the patents to Rocroy, De Mooy, Webb and Wallace 787.

The 408 patent describes a well-known clamp which has no new novel element or combination of elements. The basic elements of this patent comprise a body, a retaining pin, a spreader and a spring, all of which were old in Rocroy and De Mooy. In addition, this patent discloses a cover cap as shown in the 787 patent. The 787 patent is prior art to the 408 patent as devices constructed in accordance with the 787 patent were on sale as early as March 1941, more than two years prior to the filing date (April 9, 1943) for the 408 patent [R. 74-93].

The 787 patent discloses the use of an end cap. That element is not new with the 408 patent. Webb discloses the interlocking shoulders which prevent the explosion of the cap. The basic combination of either Rocroy or De Mooy, the end cap of Wallace 787, and the safety lock of Webb form the 408 patented device. None of these elements functioned in any new or different manner than they did in their respective patents and their combination does not add any function to the final tool that is not secured in the other patents. This 408 patent is invalid.

Mere selection of well-known parts to act in their old and well-known manner is not invention.

“\* \* \* ‘That the new combination accomplishes a better result does not alone evidence invention. “The union of the selected elements may be an improvement upon anything the art contains, but, if, in combining them, no novel idea is developed, there is no patentable invention, however great the improvement may be.”

\* \* \* \* \*

“‘It is not necessary that all of the elements of the claim be found in one prior patent. If they are all found in different prior patents and no new functional relationship arises from the combination, the claim cannot be sustained.

\* \* \* \* \*

“‘All of the elements of the patent in suit were present in the prior art, and combining these elements to make the patented device did not involve invention. \* \* \*’” (*Mettler v. Peabody Engineering Corp., et al.*, 77 F. 2d 56, 57 (C.C.A. 9).) See also:

*Eagle, et al. v. P. & C. Hand Forged Tool Co.*,  
74 F. 2d 918 (C.C.A. 9).

*Magarian v. Detroit Products Co.*, 128 F. 2d 544  
(C.C.A. 9).

**Claim 11 of the 787 Patent Is Invalid as the Subject Matter of Said Claim Was in Public Use and on Sale More Than One Year Before the First Disclosure Thereof to the Patent Office.**

Claim 11 of the 787 patent is invalid as the subject matter of said claim was in public use and on sale more than one year before the first disclosure thereof to the Patent Office. Claim 11 of the 787 patent (the only claim before this Court) was added by way of amendment to the application for this patent on November 8, 1944. This claim was application claim 33 [File Wrapper Exhibit 3, page 51]. The application for this patent was filed April 7, 1941. Appellants' Vice-President and General Manager, Mr. E. R. Livingston, testified that devices embodying this claim were manufactured and sold as early as March, 1941 [R. 74 and 93]. Under the Patent Statute a person is entitled to Letters Patent if his invention has not been "in public use or on sale in this country for more than one year prior to his application, \* \* \*." *R.S.U.S. 4886, 35 U.S.C.A., § 31.*

The Supreme Court of the United States, in *Muncie Gear Works v. Outboard M. and Mfg. Co.*, 315 U. S. 759, at 768, has held that where a party first claimed as his invention a device which was in public use or on sale in this country for more than one year prior to the presentation of the claim to the Patent Office (whether by an original application or *by amendment* of an application), a claim so lately presented to the Patent Office was invalid.\*

In the present case the appellants now assert that claim 11 should not be read to include an end wall in the

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\*It should be noted that R.S.U.S. 4886 at the time of the *Muncie Gear Works* case read "two years" while the present statute and the one controlling the patent in suit reads "one year."



body [Appellants' Opening Brief, R. 19]. If this is so and the Court could so interpret claim 11, then under the *Muncie Gear Case*, *supra*, this claim is invalid as the same was not presented to the Patent Office until November, 1944, while the Vice-President of the corporate appellant has testified that these devices were on sale as early as March, 1941. All of the claims in the application for the patent in suit (prior to the amendment which added application claim 33 (claim 11 of the patent in suit)) specifically referred to a wall closing one end of the bore [claim 1 of the patent in suit, R. 280] and the appellants urged (during the prosecution of the patent application of all of the other claims) that all of them included a "slotted end wall 12" which formed a composite end closure and that the term "end closure member" meant the combination of the slotted end wall 12 and the cap 27 [File Wrapper Exhibit 3, page 45]. Appellants always insisted to the Patent Office prior to the addition of application claim 33 (patent claim 11) that the claims of the application called for the end wall 12. They cannot now be heard to interpret these claims to the contrary, see *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U.S. 274, 279; *Hubbell v. United States*, 179 U.S. 77, 83; and *Lorraine v. Townsend*, 290 Fed. 54, 59 (C.C.A. 9). This case can not be distinguished from the *Muncie* case. The only claim according to appellants' own assertion, which claims as invention a body member which does not have an end wall is claim 11 which was added more than one year after the first public sale. This claim is invalid under R.S.U.S. 4886. It should be noted in passing that the defense sustained in the *Muncie Gear Case*, *supra*, was raised *sua sponte* by the Supreme Court and it is not necessary to separately plead the defense where testimony, as in this case, shows prior use.

## The Award of Attorneys' Fees to the Defendants in This Case Was Not an Abuse of Discretion.

The award of attorneys' fees to the defendants in this case was proper. 35 U.S.C.A. § 70 provides: “\* \* \* The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.”

In the present case the District Court exercised its discretion and awarded the defendants Five Hundred Dollars (\$500) as attorneys' fees. This statute makes the awarding of the attorneys' fees purely a matter of the lower court's discretion. Unless there has been abuse of discretion by the lower court, an appellate court will not reverse this award. Certainly this Court can take judicial notice of the fact that, in a contested patent case which takes two and one-half days in court to try, even without considering any time for preparation of the case, a larger sum than the attorneys' fees awarded in this case would be justified. This Court will not substitute its discretion for that of the District Court in fixing the amount.

The lower court did not indicate the reasons for awarding attorneys' fees. There are in this case extraordinary circumstances which could have formed the basis for the award of attorneys' fees. This case is the result of a period of four to five years of harassment of the present appellee, Donald H. Finkle, by the two appellants. He has been forced to defend his business against two unjustified patent infringement suits by these appellants. In these two suits four patents were involved, all on extremely minute differences from the basic device in the Rocroy and De Mooy patents, Exhibits H-4 and H-7. In the prior litigation between these parties (*Monogram Mfg. Co. v. F & H Mfg. Co., supra*), the Court

held the patents there in suit invalid in view of the patents to Rocroy and De Mooy, which are the same patents as Exhibits H-4 and H-7 in this litigation. Also, the Court held those patents invalid over the prior use and manufacture by Finkle, who is the Donald H. Finkle of this case. Appellants have insisted that they were the first to use two-pin type of clamps. This is false, as the decision in the former *Monogram* case held Finkle (Donald H. Finkle) to be a prior user.

In the prior case the named appellee was the F & H Mfg. Co., which was a partnership, one of the major partners being Donald H. Finkle. That case was a declaratory judgment action enjoining the appellants herein from threatening appellee's customers with infringement suits.

The present appellee (Donald H. Finkle) has been harassed, not only by the litigation of the present and the former suit, but by the continued threats of appellants against appellee's customers. There is no insistence here that there has been a violation of the injunction against this practice that was awarded in the prior case. When the patents in this case issued, the threats to the customers were all directed to these two new patents. This long campaign of threats and of actual litigation by appellants may have been an added reason for the award of attorneys' fees in this case.



### Conclusion.

Appellees respectfully submit that the appealed judgment should be affirmed.

The respective claims of the Wallace patents asserted to be infringed must be interpreted in a way that they do not read on appellees' device, otherwise the claims are invalid as anticipated and lacking in invention as appellees' device is in no way different than the prior art cited.

Respectfully submitted,

LYON & LYON,

FREDERICK W. LYON,

*Attorneys for Appellee.*



No. 11761

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

HERMAN H. HELBUSH and MONOGRAM MANUFACTURING  
Co., a corporation,

*Appellants,*

*vs.*

DONALD H. FINKLE, doing business as WEDGELOCK COM-  
PANY, *et al.*,

*Appellees.*

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## APPELLANTS' REPLY BRIEF.

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MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

811 West Seventh Street Building, Los Angeles 14,

*Attorneys for Appellants.*





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*Appellees.*

---

## APPELLANTS' REPLY BRIEF.

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Appellees' brief takes as its burden the task of diverting the Court's attention away from these unanswerable facts:

1. That the essence of the combination patented by claim 11 of Wallace patent in suit No. 2,365,787 is the overcoming of the old difficulty of assembling the two-pin type of sheet metal clamp, *by teaching the making of the clamp body in two parts: a main cylindrical body part and a separate, attachable end cap part*; and that although this problem had existed since 1933 [date of the first two-pin clamp patent, British patent 413,403, Ex. H-3], no one prior to Wallace disclosed, or even suggested, the idea of making the clamp body with a separate end cap. There is no evidence refuting this.

2. That, although the two-pin type clamp was invented first, the far less desirable one-pin or "Cleco" type clamp [exemplified by Ex. 13] remained in universal use until appellant Monogram introduced the Wallace clamp of patent 2,365,787 in 1941 [I, 78], at which time the Wallace clamp promptly entirely supplanted the "Cleco" type [I, 94] and reduced clamp costs by over 300%. There is no evidence refuting this.

3. That, although throughout all the years of using spring loaded sheet metal clamps, very serious personal injuries continued to be suffered by workmen due to the clamps flying apart and striking workmen, not until 1933, when Wallace invented the double safety stop feature of patent in suit 2,364,408, did any one overcome this hazard; and, when this Wallace clamp was introduced by appellant Monogram, it was promptly adopted universally. There is no evidence refuting this.

4. That the record fails to disclose any facts or conduct on the part of appellants justifying the award of attorneys' fees. Appellees' argument is based entirely upon statements of pretended facts contained in appellees' brief, which statements are erroneous and find no support whatsoever in the record.

## The Trial Court Refused to Find the Patents in Suit to Be Limited to Including an End Wall in Addition to a Separate End Cap.

At pages 13-18 of their brief, appellees argue that both patents in suit are limited to a clamp having an end wall on the body as well as an end cap over that end wall, and that the Trial Court so found.

This is incorrect. The Trial Court expressly refused to so find or to so conclude. This refusal is shown by findings numbered 23 [I, 29], 34 [I, 31] and Conclusions of Law numbered 5 and 6 [I, 32], which were *proposed* by appellees but were *stricken* by the Trial Court.

Since the patent claims in issue do not include an end wall element, the patents could not properly be so limited unless it were shown that (a) an end wall in addition to an end cap was essential to operability, or (b) unless the prior art rendered such an interpretation essential to novelty. As pointed out in appellants' opening brief, neither is true and neither is established by any evidence.

Moreover, patent No. 2,364,408 could not by any possibility be so construed because it does not even show the clamp body as having an end wall. In the disclosure of that patent, a washer is inserted in the open end of the clamp body precisely as is done by appellees in constructing their accused clamp, Ex. 11.

It is to be noted that, in appellees' analysis of patent 2,365,787 appearing at page 13 of their brief, they carefully omit reference to the separate end cap feature of the patent in order to lend pertinence to the prior Rocroy and DeMooy patents, Exs. H-4 and H-7.



### **The Patents in Suit Are Improvement Patents.**

Appellants have never contended otherwise than that the Wallace patents are only improvements over the prior patents before the Court. It is appellants' contention, however, that the Wallace patents teach highly important improvements which very materially advanced the art. In fact, the two-pin type clamp was only in the "paper patent" stage until the Wallace improvements of patent 2,365,787 made it practicable. It is to be noted that the statement appearing at the bottom of page 4 of appellees' brief, implying that the two-pin type clamps of the prior art of record were "used both in this country and abroad" prior to the recent war, is not only unsupported by the record, but is directly contrary thereto.

### **Appellees' Clamp Assembly Procedure Requires a Separate End Cap.**

At page 15 of their brief, appellees argue that they devised a better assembly procedure than that of appellant Monogram. Whether that be true or not is immaterial, because the record shows that appellees had to use the Wallace separate end cap feature in order to carry out their assembly procedure.

### **Rocroy and DeMooy Fail to Show the Separate End Cap Feature.**

At page 19 of their brief, appellees state that patent 2,365,787 shows nothing new over Rocroy or DeMooy. However, that statement completely overlooks the fact that neither Rocroy nor DeMooy, nor any other prior patent, shows the separate end cap feature of the Wallace patent.

## **Patent 2,364,408 Discloses a Valid Combination Invention.**

At pages 23-24, appellees argue that patent 2,364,408 shows nothing more than an unpatentable collection of old elements. It is true that, individually, all the elements of this patent may be found in prior patents, but in those prior patents those elements do not cooperate to provide the Wallace double safety stop feature, the great utility of which is not questioned. The headed ends of the clamping pins 20, with the spreader between them, abut the end cap to provide one of the safety stops. If those heads should break off, the cooperating shoulders 16 and 17 provide the second safety stop to prevent the clamp from flying apart, and vice versa. And normally both those stops operate at the same time to share the spring load stresses.

## **The Muncie Gear Case Is Not Analogous.**

At pages 25-26, appellees argue that claim 11 of patent 2,365,787 is invalid because the clamps had been in public use more than a year before the claim was inserted in the patent application, citing *Muncie Gear Works v. Outboard M. and Mfg. Co.*, as authority. The file wrapper of the patent, Ex. 3, shows that, from the date of filing, claims to the end wall feature were in the case. Claim 11 was inserted after termination of an interference proceeding in Wallace's favor, and was like other claims in the patent except that it omitted the obviously unnecessary end wall element.

The *Muncie Gear* case is not at all in point. In that case, the patentee, after prosecuting the application for several years upon one theory of what the invention was, and after its subject matter had been in public use for years, commenced prosecuting the application upon an entirely new and different theory, and claiming things never before mentioned in the case. Clearly those facts are not present here.

### **The Award of Attorneys' Fees Is Unjustified.**

At pages 27-28, appellees attempt to justify the award of attorneys' fees, by advancing the entirely unsupported argument that appellants have harassed appellee Donald H. Finkle. It is unfair for appellants to make such statements in their brief when they are unsupported by the record.

Reference is there made to the case of *Monogram Mfg. Co. v. F. & H. Mfg. Co.*, 144 F. (2d) 412, stating that case to be prior litigation "between these parties." That prior case was against a copartnership, of which said Finkle was a member, and involved different patents.

Moreover, appellants did not institute that suit. Said copartnership sued for a declaratory judgment and appellees counterclaimed for infringement because that was a necessary counterclaim. There is no showing that the counterclaim was unjustified or in bad faith. The courts are the only tribunals to which a patentee may apply for an adjudication of his rights, and the bringing of a suit in good faith is not a wrong.



However, the record in the instant case does show that when appellant Monogram introduced the clamp of patent 2,365,787, Finkle copied it; and again when Monogram introduced the clamp of patent 2,364,408, Finkle copied that one also, which shows that Finkle has been a persistent infringer of appellants' patents. It is submitted, therefore, that if appellants were not fully justified in asking the Court to adjudicate their claim, then the patent statute has been reduced to a trap for well meaning inventors instead of being an incentive for the advancement of the arts and sciences as intended by the Constitution.

### Conclusion.

It is respectfully submitted, therefore, that appellants have failed to show any valid reason why the appealed judgment should not be reversed.

Respectfully submitted,

MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

*Attorneys for Appellants.*



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COMPANY,

*Appellee.*

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## BRIEF AS AMICUS CURIAE.

---

HARRIS, KIECH, FOSTER & HARRIS,  
WARD D. FOSTER,  
WARREN L. KERN,

321 Subway Terminal Building, Los Angeles 13,

*Amicus Curiae.*

JUN 26 1949





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**BRIEF AS AMICUS CURIAE.**

---

**I.**

**It Is an Abuse of the Trial Court's Discretion to  
Award Attorneys' Fees to a Prevailing Defendant  
Sued for Infringement of Letters Patent Unless  
There Is Some Evidence of Special Circumstances  
Justifying Such Award.**

In a patent infringement action attorneys' fees may be awarded by the Trial Court in its discretion pursuant to 35 U. S. C. A. 70, as amended in 1946, which provides in part:

“ . . . The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.”

The statute does not imply that attorneys' fees should in every instance be awarded the prevailing party but requires the Trial Court to apply its best judgment to a determination of the proper circumstances under which an award should be made; and in doing so the Trial Court must act in conformity with established precedent and the intent and purpose of the statute conferring such discretion. Action by the Trial Court, according to its own will or pleasure without reference to determining principles, constitutes an abuse of discretion which the Appellate Court may set aside.

*Bowles v. Quon*, 154 F. (2d) 72, 73 (C. C. A. 9, 1946).

**(a) It Was Not the Purpose of the Amended Statute, 35 U. S. C. A. 70, to Award Attorneys' Fees to the Prevailing Defendant in a Patent Infringement Suit Except Under Special Circumstances Resulting in a Gross Injustice.**

The expressed purpose of Congress in passing the amendment to 35 U. S. C. A. 70, under which the Trial Court made the award, herein, is stated in Senate Report No. 1503, June 14, 1946, which was adopted by the Senate Committee on Patents from a report of the House Committee on Patents. The relevant portion reads as follows:

“By the second amendment the provision relating to attorney's fees is made discretionary with the court. It is not contemplated that the recovery of attorney's fees will become an ordinary thing in patent suits, but the discretion given the court in this respect, in addition to the present discretion to award triple damages, will discourage infringement of a patent by anyone thinking that all he would be required to pay if he loses the suit would be a royalty.

*The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer.”* (Italics are ours.)

An infringement suit brought merely to vex or harass the defendant without any substantial likelihood of recovery or reasonable grounds for belief in the validity of the patent or infringement thereof might well result in a gross injustice to an alleged infringer forced at great cost to defend such action. It is suits of this type the statute obviously seeks to thwart by providing the hazard of an additional penalty which may be imposed on those who litigate in bad faith; but for the Trial Court to apply this same penalty to the ordinary patent suitor, who, in good faith and with reasonable chances for recovery, brings his action to protect his due right, is to condemn the innocent with the guilty and thereby negate the beneficial purpose of the amendment. An award of attorneys' fees by the Trial Court in such an instance disregards the statutory intent and is an abuse of the Court's discretion.

**(b) The Award of Attorneys' Fees to the Prevailing Party in a Patent Infringement Suit in the Absence of Special Circumstances Is Contrary to Well Established Precedence.**

Prior to the enactment of the amendment to 35 U. S. C. A. 70 heretofore quoted, it was long established that an allowance of attorneys' fees to the successful party in a patent infringement action was improper. The basis of this rule was explained at some length by the Supreme Court in *Oelrichs v. Williams*, 82 U. S. 211; 21 L. Ed. 43 (1872), as resting on sound public policy:

“ . . . It is the settled rule that counsel fees cannot be included in the damages to be recovered



for the infringement of a patent. *Teese v. Huntingdon*, 23 How. 2 (64 U. S., XVI, 479); *Whittemore v. Cutter*, 1 Gall. 429; *Stimpson v. The Railroads*, 1 Wall., Jr., 164. . . .” (p. 45.)

“. . . In debt, covenant and *assumpsit* damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

*“We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy.”* (p. 45.) (Italics in last paragraph are ours.)

The present amendment to 35 U. S. C. A. 70, being in derogation of a long established rule of law forbidding

counsel fees, should be strictly construed as making only such change as is clearly indicated by the legislative expression and intent.

*Shaw v. Merchants National Bank*, 101 U. S. 575, 25 L. Ed. 892 (1880).

Further precedent for the interpretation of the new amendment is the judicial construction placed upon a substantially similar statute relating to attorneys' fees in copyright cases. That statute (17 U. S. C. A. 40), after providing for the allowance of full costs, states:

“ . . . In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs. (Mar. 4, 1909, c. 320, §40, 35 Stat. (1084.)”

While the language of the two statutes is not identical, they are similar in effect and legal import. The Courts have consistently interpreted the provisions of the copyright statute as discretionary only and have generally refused to award attorneys' fees to the prevailing party except under special circumstances where dictated by equity and good conscience. This Court, for example, in construing the copyright section in *Buck v. Bilkie*, 63 F. (2d) 447 (C. C. A. 9, 1933), said:

“Under section 40 of the act (17 U. S. C. A., §40), ‘the Court may award to the prevailing party a reasonable attorney's fee.’ Any such award is clearly discretionary: We find no abuse of discretion in the denial of attorneys' fees, inasmuch as infringement ceased immediately on what defendant testified to have been the first notice received.” (p. 447.)

Although the amendment to 35 U. S. C. A. 70 is too recent to have received extensive judicial interpretation, in a number of well reasoned District Court opinions counsel fees have been denied in the exercise of the Court's discretion under this section.

In *Juniper Mills, Incorporated v. J. W. Landenberger & Co.*, 76 U. S. P. Q. 300 (Advance Sheet) (D. C., E. D. Pa. 1948), Judge Kirkpatrick, on plaintiff's motion for an award of attorneys' fees, stated:

"It has never been supported that counsel fees are normally allowable to a successful party as part of the costs. In most, if not all, cases, where statutory authority has been given to the court to allow them, the intention has been to make the allowance something in the nature of a penalty for some sort of unfair, oppressive or fraudulent conduct on the part of the losing party. I think this was the reason why the 1946 amendment made the award discretionary with the court and I believe the court should not award an attorney's fee as costs in an ordinary normal patent case." (p. 300.)

Similarly, in the case of *Lincoln Electric Co. v. Linde Air Products Co.*, 74 Fed. Supp. 293 (D. C., N. D. Ohio, 1947) (75 U. S. P. Q. 267), the Court held that in an ordinary patent action an award to the prevailing defendant was not authorized by the statute:

". . . It is apparent from the wording of the statute and its history that an award of attorneys' fees should not be made in an ordinary case. The court is invested with discretionary power where it is necessary to prevent gross injustice. The case at bar presents a situation which is not unusual in patent matters. This court finds no special circumstances



of gross injustice. . . . This court does not consider that the action by the plaintiff was absolutely unwarranted or unreasonable. Since the award asked by the defendant is contrary to long established practice, a clear showing of the conditions indicated in the statute must be made to entitle the applicant to the relief sought. The circumstances and conditions surrounding the parties in this litigation do not warrant an award of attorneys' fees to the prevailing party. . . .” (p. 294.)

The *Lincoln Electric* case is quoted with approval by Judge Starr in *National Brass Company v. Michigan Hardware Company*, 76 U. S. P. Q. 186 (Advance Sheet) (D. C., W. D. Mich., 1948). After reviewing extensively the judicial interpretation of the provision permitting attorneys' fees in copyright cases and reasoning from such construction to interpret the new patent provision, the Court concluded:

“A careful review of the pleadings, testimony, and circumstances in the present case clearly indicates that it was the usual and ordinary suit for infringement of patent and that it was instituted in good faith and vigorously prosecuted. The court finds no evidence indicating bad faith or dilatory, harassing or vexatious tactics on the part of the plaintiff. There appear to be no special circumstances and no equitable considerations which would justify an award of attorneys' fees to the defendant. . . .” (p. 187.)

It is apparent that a Trial Court in awarding attorneys' fees in the absence of special circumstances, fails to construe the new amendment in accordance with its express purpose and intent and fails to look to the history of

the amendment, the judicial interpretation of analogous statutes, and the decisions of other Courts in determining principles and proper guidance.

It is submitted that it will be of great assistance to the District Courts of this Circuit, the patent bar, and patent litigants if this Court will clearly state the rule to be that in awarding reasonable attorneys' fees to the prevailing party in accordance with the provision of 35 U. S. C. A. 70, as amended in 1946, the Court should award such fees only in a case involving bad faith or dilatory, harassing, or vexatious tactics on the part of the losing party or similar special circumstances establishing inequitable conduct by such party.

Dated: At Los Angeles, California, this 19th day of May, 1948.

Respectfully submitted,

HARRIS, KIECH, FOSTER & HARRIS,  
WARD D. FOSTER, WARREN L. KERN,

By WARD D. FOSTER,

*Amicus Curiae.*

C. LAUREN MALTBY  
417 S. Hill St. Los Angeles

PHILIP SUBKOW  
727 West 7th St.  
Los Angeles

C. G. STRATTON  
210 W. 7th  
Los Angeles

C. A. MIKETTA  
210 W. 7th St.  
Los Angeles, Calif.

HAROLD W. MATTINGLY  
621 So. Hope Street  
Los Angeles 14, Calif.

ROBERT W. FULWIDER  
5225 Wilshire Blvd.  
Los Angeles 36, Calif.

HAMER JAMIESON  
Security Building  
Los Angeles 13.

(over)





J. CALVIN BROWN  
704 S. Spring St.  
Los Angeles Calif.

WEBSTER & WEBSTER  
PERCY S. WEBSTER  
311 E. Main St.  
Stockton, Calif.

ALAN FRANKLIN  
356 South Spring Street  
Los Angeles 13, California

MELLIN AND HANSCOM  
OSCAR A. MELLIN  
391 Sutter St.  
San Francisco 8, Calif.

HENRY GIFFORD HARDY  
Russ Bldg.  
San Francisco 4, Calif.





No. 11764  
IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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HARRY E. DEAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLEE'S BRIEF.**

---

JAMES M. CARTER,

*United States Attorney;*

ERNEST A. TOLIN,

*Chief Assistant U. S. Attorney,*

United States Postoffice and

Courthouse Building, Los Angeles 12,

*Attorneys for Appellee.*



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No. 11764

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

HARRY E. DEAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

### I.

#### Basis of Jurisdiction.

A. The District Court had jurisdiction to receive the plea of guilty interposed by appellant and to impose the judgment made and entered herein, under the authority of Title 18, United States Code, Sections 312, 313, 317 and 320, and of Title 28, United States Code, Section 41, Subdivision 2.

B. The indictment contained five counts. Count One charged a violation of Section 320, United States Code, Title 18, in that the appellant, with another, assaulted a railway postal clerk and a mail guard with intent to rob them and steal mail matter then in their custody, and that in attempting to effect such robbery appellant and his co-defendant wilfully put such postal clerk and mail guard in jeopardy of life by the use of a pistol and a sawed-off shotgun. Upon this count, appellant was sentenced to imprisonment for a term of twenty-five years.

Count Two charges a violation of Section 312, United States Code, Title 18, in that the appellant and another defendant wilfully injured certain mail pouches containing registered mail. Counts Three and Four charge the violations of Section 313, United States Code, Title 18, in that the defendant and appellant, and another defendant, did wilfully steal and purloin certain property belonging to the Post Office Department of the United States and in use by said Department. Count Five charged a violation of Section 317, United States Code, Title 18, in that the appellant, and another, did wilfully steal, abstract and remove a certain article of registered mail from a mail bag which was then and there in transmission as mail matter through the Post Office establishment of the United States.

Each of said counts alleged the commission of the offense within the County of Los Angeles, State of California, Southern District of California, Central Division. Such offenses are triable by the United States District Court under authority of the sections of the United States Code, above cited.

Following appellant's plea of guilty he was sentenced to imprisonment for a term of twenty-five years upon Count One, and for concurrent terms of three years upon each of the other four counts. Judgment was pronounced on September 5, 1933. The present appeal is from an order denying a motion to vacate judgment, made by appellant in the District Court June 30, 1947, and denied in that court on August 9, 1947. Jurisdiction of the



District Court to entertain the motion was derived from Rule 35 of Rules of Criminal Procedure.

C. This court has jurisdiction of the appeal under the provisions of Title 28, United States Code, Section 225 (a) and (d).

### **Statement of the Case.**

This is an appeal by Harry E. Dean from an order denying a motion to vacate judgment upon the theory that the judgment imposed upon him was an illegal one within the meaning of Rule 35 of the Federal Rules of Criminal Procedure. On September 5, 1933, appellant entered his plea of guilty to each of the five counts of the indictment herein. The court imposed sentence the same day and appellant is now serving the sentence of imprisonment described in the judgment of the court. On June 30, 1947, appellant filed his motion to vacate judgment in the District Court. The motion was based upon a contention that the judgment was void, for the reason that the court was without jurisdiction to impose any sentence whatever upon appellant for the reason that there were no women on the grand jury venire which returned the indictment to which he pleaded guilty.

### **Questions Involved in the Appeal.**

Appellant states his contention in seven ways. It appears that these are but varying methods of stating his proposition that the judgment is void for the reason that there were no women upon the grand jury which returned the indictment against him. Appellee believes that appellant intended to make his point broader than it is stated,

by complaining that women were systematically excluded from the grand jury which returned the indictment in his case, and as that appears from his brief to be the theory in his appeal appellee states its understanding of the single question involved in the appeal to be—did the court err in denying appellant's motion to vacate the judgment for the reason that the grand jury which returned the indictment against appellant was one from which women were systematically excluded from service?

### **The Facts.**

The motion was heard in the District Court upon the written motion which appears at page 12 of the Record, and upon the Memorandum of Points and Authorities appended thereto. No evidence was taken. It is noted that in the designation of record, appellant designated the following:

“5. Certificate of the names of the grand jurors which returned the indictment herein, August 23, 1933.”

The Clerk has provided that certificate [R. 20]. Although the motion was heard without the introduction of evidence it is conceded by appellee that the trial court took judicial notice of the practice prevailing in the Southern District of California at the time of the return of the indictment herein, with respect to the impanelment of grand jurors. It is further conceded that the grand jury which indicted defendant had been impanelled in substantially the same manner and under substantially the same practice as was employed in the impanelment of the grand jury which indicted the defendants in *Ballard v. United States*, 67 S. Ct. 261, 329 U. S. 187.

## ARGUMENT.

**Appellant Waived Any Objection to Which He May Have Been Entitled Concerning the Impanelment of the Grand Jury, by His Failure to Present His Challenge in the District Court Prior to the Entry of His Plea of Guilty.**

There was no demurrer, motion to quash, or other pleading in the District Court by way of challenge to the form of the indictment or the manner in which it had been obtained or the authority of the grand jury which returned it. Prior to the entry of the plea of guilty there had been a plea of not guilty [R. 9]. The court appointed counsel to represent the two defendants in the case. Plea of not guilty was entered on August 28, 1933, and counsel appointed that day [R. 8]. On September 5, 1933, appellant appeared before the court with his counsel and changed his plea to guilty [R. 10]. The brief record of proceedings in the District Court does not indicate any proceeding other than an original plea of not guilty followed by a change of plea to guilty, without any question of jurisdiction or the authority of the grand jury being presented. Appellant relies upon *Ballard v. United States*, 67 S. Ct. 261, 329 U. S. 187. In that case an attack was made upon the indictment in the District Court. The attack clearly indicated that it was based upon the displeasure of the defendant in that case with having been indicted by a grand jury from which women were systematically excluded.<sup>1</sup>

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<sup>1</sup>In its final opinion (329 U. S. 187), the Supreme Court observed:

“This issue was raised by a motion to quash the indictment and by a challenge to the array of the petit jurors because of intentional and systematic exclusion of women from the panel.

“Both motions were denied and their denial was assigned as error on appeal. *The jury question has been in issue at each*



Appellant further cites *Arthur L. Bell v. United States*, 159 F. (2d) 247 (C. C. A. 9, Feb. 4, 1947). The appellant in that case attacked the indictment in the District Court in much the same manner as was done in the *Ballard* case.<sup>2</sup>

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*stage of the proceedings, except the first time that the case was before us. At that time the point was not assigned or argued. But the case was here at the instance of the United States, not at the instance of the present petitioners \* \* \** when we remanded the case for consideration of the remaining issues by the Circuit Court of Appeals, the jury issue was argued. *The Circuit Court of Appeals did not hold that it had been waived.* That Court passed upon the issue, concluding that there was no error in the exclusion of women from the panel, 152 F. 2d 944, and see dissent at page 953. Under these circumstances we cannot say (and the Government does not suggest) that petitioners have lost the right to urge the question here." (Emphasis supplied.)

<sup>2</sup>Prior to the entry of a plea of not guilty, defendants in the *Bell* case filed an instrument in the District Court which they entitled "Plea In Bar." That plea, reported at page 37 of the Transcript of Record in *Bell v. United States*, 159 F. (2d) 247, is as follows:

#### PLEA IN BAR

Now come the defendants Arthur L. Bell, George Gouverneur Ashwell, Homer G. Wilcox, Bay Burns Sharpe, J. F. Burkey, Max Theodore Miller, Harold Von Norris, William Duerst, Maude Askew, Pauline Kelso, Lawrence Cook, Ed Gilson and Jacob Gloeckler and move this Court to set aside the indictment filed in this case as against these defendants, for the following reasons:

1. That the indictment herein is barred by reason of the fact that the charge against these defendants was presented to and passed upon by an illegal panel of Grand Jurors in that the names of no women had been placed upon said panel and the names of no women were inserted for the drawing of prospective members of said Grand Jury, although in said district and subject to call more than one-half of the persons eligible for grand jury duty were women;

2. That this plea in bar is based upon the affidavit of Jacob Gloeckler hereto attached; and said defendants further request the right to present oral and written evidence thereunder.

Wherefore, these defendants demand judgment herein dismissing the indictment as barred from further prosecution, and

*Zap v. United States*, 151 F. (2d) 100 (C. C. A. 9, June 4, 1945), 91 L. Ed. 388, 330 U. S. 800, is cited as further authority. The defendant in that case had indicated his dissatisfaction with the grand jury at an early stage of the proceedings.<sup>3</sup>

Appellant, in the case now before the court, is in a position comparable to that of the petitioner in *Redmon v. Squier*, 162 F. (2d) 195 (C. C. A. 9, May 16, 1947)

Page 196—

“As far as the Ballard case, *supra*, is concerned, it is not authority for the proposition that a grand jury panel can be attacked by habeas corpus proceedings. The objection should be made seasonably, by motion to quash, or some similar motion.”

---

further dismissing and discharging those defendants from custody.

The defendant also made a motion to quash indictment, based upon several grounds including the manner in which the grand jury had been drawn. [Transcript of Record, *Bell v. United States*, page 44.]

<sup>3</sup>Defendant Zap, prior to the entry of his plea of not guilty, filed an instrument in the District Court entitled “Plea in Abatement.” This attack upon the indictment appears at page 210 of the Transcript of Record in that case, as follows:

#### PLEA IN ABATEMENT

Comes now the defendant Edward F. Zap and pleads in abatement to the indictment herein returned that the Grand Jury which returned the indictment was composed entirely of men, and that no women were on the panel from which the said Grand Jury was selected, and that the said Grand Jury was not constituted in accordance with the provisions of Title 28, Section 411, United States Codes Annotated.

Wherefore, defendant prays that the case be dismissed and he be discharged from custody.

The record further contained an affidavit setting forth facts in support of the plea. [Transcript of Record, *Zap v. United States*, page 211.]

See, also *King v. United States*, 165 F. (2d) 408 (C. C. A. 8, Jan. 13, 1948). In that case the following appears:

“[1] Appellant, by motion to vacate judgment, sought to have his sentence and conviction set aside, on the ground that there had been an intentional and systematic exclusion of women (who are eligible for jury service in Arkansas) from the grand jury by which he was indicted and from the petit jury by which he was tried. The trial court denied the motion.

“No objection had previously been made to either the grand jury or the petit jury in the trial court or on the appeal taken to this court from the conviction. *King v. United States*, 8 Cir., 144 F. 2d 729, certiorari denied 324 U. S. 854, 65 S. Ct. 711, 89 L. Ed. 1413.

“[2] As the *Wright* case holds, the right to not have women intentionally and systematically excluded from a jury panel is one that may be waived, and it will ordinarily be deemed to have been so waived where timely objection is not made in the proceedings and the question is sought to be raised for the first time by a motion to vacate the judgment.”

On the same day that the *King* case was decided, the same court, at 165 F. (2d) 405, decided *Wright v. United States*, which presented the identical question. The following pertinent language is included in that case:

“\* \* \* Section 556a, Title 18 U. S. C. A., provides as follows: ‘No plea to abate nor motion to quash any indictment upon the ground of irregularity in the drawing or impaneling of the grand jury or upon the ground of disqualification of a grand juror



shall be sustained or granted unless such plea or motion shall have been filed before, or within ten days after, the defendant filing such plea or motion is presented for arraignment; \* \* \*.'

"This statute in form at least limits the power of a court to consider the alleged irregularity in the drawing of the grand jury and when the time limited by the statute has passed the power of the court to entertain an objection to the panel on the ground of the disqualification of the grand jurors is at an end. *Medley v. United States*, App. D. C., 155 F. 2d 857; *United States ex rel. McCann v. Thompson*, 2 Cir., 144 F. 2d 604, 156 A. L. R. 240. Rule 6(b) (1) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. following section 687, provides that, 'The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.'

"Rule 6(b) (2) provides as follows: 'A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. \* \* \*'

"The manifest purpose of these rules is to require that objections to the array or panel be presented at the early stages of the proceeding. In *Carruthers v. Reed*, etc., 8 Cir., 102 F. 2d 933, 939, we held that, 'The right to challenge the panel is a right that may be waived and is waived if not seasonably presented.

Such rights, if waived during trial, may not be availed of by attack, in a collateral proceeding.' See also *United States ex rel. Marshall v. Snyder*, 2 Cir., 160 F. 2d 351.

"Defendant relies chiefly on the decisions of the Supreme Court in *Ballard v. United States*, 329 U. S. 187, 67 S. Ct. 261, and *Thiel v. Southern Pacific Co.*, 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181, 166 A. L. R. 1412. In each of these cases, however, the challenge to the panel was timely made and preserved."

### Conclusion.

It is respectfully submitted that the District Court was correct in its denial of appellant's motion to vacate judgment, and that the order should be affirmed.

Respectfully submitted,

JAMES M. CARTER,  
*United States Attorney;*

ERNEST A. TOLIN,  
*Chief Assistant U. S. Attorney,*  
*Attorneys for Appellee.*

No. 11765

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

GEORGE THOMAS,

Appellant,

vs.

FURNESS (PACIFIC) LIMITED, a corporation  
and SHAW, SAVILL & ALBION, LTD.,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

FILED  
JAN 1900

PAUL P. GORRIEN,





No. 11765

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

GEORGE THOMAS,

Appellant,

vs.

FURNESS (PACIFIC) LIMITED, a corporation  
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Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

GLADSTEIN, ANDERSEN,  
RESNER & SAWYER,  
240 Montgomery Street,  
San Francisco, California,

Attorneys for Plaintiff and Appellant.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE,  
1400 Balfour Building,  
351 California Street,  
San Francisco, California,

Attorneys for Defendants and Appellees.

In the Superior Court of the State of California  
in and for the City and County of San Francisco

No. 355516

GEORGE THOMAS,

Plaintiff,

vs.

FURNESS PACIFIC LIMITED, THE BLACK  
& WHITE COMPANY, a corporation, THE  
DOE COMPANY, JOHN DOE and RICH-  
ARD ROE,

Defendants.

### COMPLAINT FOR DAMAGES

Comes now the plaintiff and for cause of action  
alleges:

#### I.

That the defendant Furness Pacific Limited is a corporation existing under and by virtue of the laws of a state unknown to plaintiff, and does business and maintains a principal place of office in the City and County of San Francisco, State of California, and is within the jurisdiction of the above-entitled Court.

#### II.

That the true names of the defendants sued herein as The Black & White Company, a corporation, The Doe Company, John Doe and Richard Roe are presently unknown to plaintiff, and plaintiff prays leave to amend this complaint and insert herein said true names when ascertained.



## III.

That during all of the times herein mentioned the defendants owned, managed, operated, navigated, maintained and controlled the British vessel SS Fordsdale, and employed and sued said vessel in [1\*] the transportation of freight and passengers for hire in interstate and foreign commerce.

## IV.

That on or about May 21, 1946, at or about the hour of 8 p.m., the said SS Fordsdale was docked at the port of Oakland, California, at the Encinal Terminals thereof. That at said time and place plaintiff was a business invitee of defendants and was present on said vessel in his capacity as a stevedore, plaintiff then and there being in the employ of the San Francisco Stevedoring Company, and was present on said vessel during and within the course and scope of his employment by said company, which then and there was engaged in working cargo aboard said vessel at the special instance and request and for and on behalf of defendants herein.

## V.

That at said time and place the defendants negligently and carelessly failed to safely and properly maintain said vessel, its maindeck and the winches, appurtenances, gear and appliances of said vessel, and particularly the #1 hatch and winches at the said #1 hatch and the decks in the vicinity of the

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

said #1 hatch, in the following respects: defendants so negligently and carelessly maintained the winches at the said #1 hatch that said winches leaked oil, which oil thereupon dropped to the maindeck in the vicinity of the said #1 hatch and upon the said #1 hatch, thereby causing said deck and hatch to be in a slippery, dangerous and unsafe condition. That at the said time and place the defendants negligently and carelessly failed to maintain proper and sufficient lights at the said #1 hatch, and the said deck in the vicinity of the said #1 hatch was dark and unlighted, and it was very difficult for plaintiff to see the place about which he was compelled to work aboard said vessel.

That said vessel was unseaworthy in said respects, namely, in that there were insufficient lights present in the vicinity of the said #1 hatch to properly and safely light said deck at said place, and the said winches were unseaworthy in that they leaked oil, [2] which oil fell to and was present on the maindeck in the vicinity of the #1 hatch and on the #1 hatch; and the said vessel was unseaworthy in that the maindeck in the vicinity of the #1 hatch and the said #1 hatch were oily, slippery, and failed to constitute a safe, proper and sufficient surface upon which plaintiff could work and walk while doing this work as a stevedore aboard said vessel.

That as a direct and proximate result of the negligence and carelessness of defendants, and the unseaworthiness of the said vessel, as aforesaid, plaintiff was unable to see where he was working

at the time and place in question, and plaintiff was caused to, and he did, slip and fall on said oily deck in the vicinity of the said #1 hatch and on the #1 hatch, and as a result thereof plaintiff suffered and incurred grievous and severe physical and bodily injuries, as follows: injury to plaintiff's back, injury to his right arm and elbow, injury to his right hand, and injury to his right hip.

The plaintiff at the present time does not know the exact extent of said injury, but is informed and believes and alleges that the injury to his back and right hip are permanent in character. That plaintiff has suffered severe and grievous physical and mental pain and suffering as a result of said injuries. That as a result of said injuries plaintiff has suffered general damages in the amount of \$25,000.

## VI.

That at the time of the aforesaid accident plaintiff was gainfully employed as a longshoreman and was earning wages in the sum of \$100 per week. That plaintiff has been unable to work as a result of said injuries from May 21, 1946, until the date hereof, a period of eight weeks, and plaintiff has thereby suffered special damages on account of wage loss in the amount of \$800, which sum and the whole thereof is presently due, owing and unpaid to him by the defendants. [3]

Plaintiff is informed and believes and alleges that he will suffer further wage loss in the future as a result of said injuries, and plaintiff prays leave to amend his complaint and insert herein, or to



offer proof thereof at the time of trial, the amount of such further wage loss when ascertained.

## VII.

That as a result of said injuries plaintiff was caused to, and he did, secure the services of doctors, nurses, hospital, and incurred expenses for X-rays, medicines and medical supplies. That plaintiff does not know the exact cost of said medical services and supplies and prays leave to amend his complaint and insert herein, or to offer proof at the time of trial, said cost when said has been ascertained; and plaintiff also prays leave to amend his complaint and insert herein, or to offer proof at the time of trial, the amount of such other and further costs for medical services and expenses which he may incur and which he is informed and believes and alleges that he will incur in the future.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of \$25,800, plus cost of medical services and supplies, future wage loss and medical services and expenses, costs of suit herein, and for such other and further relief as is meet and just in the premises.

Dated July 16, 1946.

GLADSTEIN, ANDERSEN,  
RESNER, SAWYER &  
EDISES,  
By HERBERT RESNER,  
Attorneys for Plaintiff. [4]

State of California,  
City and County of San Francisco—ss.

George Thomas, being first duly sworn, deposes and says:

That he is the person named in the within and foregoing action; that he has read the complaint on file herein and knows the contents thereof; that same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

GEORGE THOMAS.

Subscribed and sworn to before me this 16th day of July, 1946.

[Seal]                      DOROTHY H. McLENNON,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Aug. 24, 1946. C. W. Calbreath, Clerk. [5]

[Title of Superior Court and Cause.]

NOTICE OF FILING RECORD ON REMOVAL  
AND COST BOND

To plaintiff above named and to Messrs. Gladstein,  
Andersen, Resner, Sawyer and Edises, his  
attorneys:

You and Each of You Will Please Take Notice,  
and You Are Hereby Notified, that the record on  
removal in the above entitled action, together with  
a cost bond in the sum of \$250.00, conditioned as  
required by Rule 9(f) of the above entitled court,  
were filed in the above entitled court on the 24th  
day of August, 1946.

FARNHAM P. GRIFFITHS,  
McCUTCHEN, THOMAS,  
MATTHEW, GRIFFITHS  
& GREENE,  
Attorneys for Defendant  
Furness (Pacific) Limited.

[Acknowledgment of receipt of service.]

[Endorsed]: Filed Aug. 26, 1946. C. W. Cal-  
breath, Clerk. [6]



[Title of Superior Court and Cause.]

MOTION FOR SUMMARY JUDGMENT  
AND NOTICE OF MOTION

Defendant Furness (Pacific) Limited moves the court as follows:

I.

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of defendant on the ground that there is no genuine issue as to any material fact, and that defendant is entitled to judgment as a matter of law.

II.

That defendant's time to answer or otherwise move with respect to the complaint under Rule 12 of the Federal Rules of Civil Procedure be extended until the disposition of this motion.

III.

This motion is based upon:

- (1) The affidavit of James West, Manager of Furness (Pacific) Limited, filed herewith;
- (2) The complaint on file in this action; and
- (3) The reasoning and authorities set forth in defendant's memorandum filed herewith.

/s/ FARNHAM P. GRIFFITHS,  
McCUTCHEN, THOMAS,  
MATTHEW, GRIFFITHS  
& GREENE,

Attorneys for Defendant  
Furness (Pacific) Limited.

## Notice of Motion

To the plaintiff, George Thomas, and to Messrs. Gladstein, Andersen, Resner, Sawyer and Edises, his attorneys:

You and each of you will please take notice that the undersigned will, on the 30th day of September, 1946, at the hour of 10 o'clock or as soon thereafter as counsel can be heard, appear before the Honorable A. F. St. Sure, in his courtroom in the Post Office Building, 7th and Mission Streets, San Francisco, California, and move that a summary judgment be entered in favor of defendant in accordance with Rule 56 of the Federal Rules of Civil Procedure. In support of said motion and filed herewith is a draft of the order which defendant proposes; a copy of an affidavit of James West, Manager of Furness (Pacific) Limited, which defendant will present in support of the motion; and a memorandum of points and authorities on which defendant relies.

Dated, San Francisco, California, this 13th day of September, 1946.

/s/ FARNHAM P. GRIFFITHS,  
McCUTCHEN, THOMAS,  
MATTHEW, GRIFFITHS  
& GREENE,

Attorneys for Defendant

Furness (Pacific) Limited.

[Acknowledgment of receipt of service.]

[Endorsed]: Filed Sept. 13, 1946. C. W. Calbreath, Clerk. [8]

[Title of Superior Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT

State of California,  
City and County of San Francisco—ss.

James West, being first duly sworn, deposes and says:

That he is the Manager of Furness (Pacific) Limited, defendant in the above entitled action; that he is familiar with the operations and affairs of said defendant, and that if sworn as a witness he could competently testify to the following facts:

1. That defendant Furness (Pacific) Limited was not at any time referred to in the complaint herein, and is not now, the owner, owner pro hac vice or charterer of the SS Fordsdale or connected with said vessel in any way other than as hereinafter stated.

2. That on April 24, 1946, the SS Fordsdale was redelivered to her owners at San Francisco by the British Ministry of War Transport, an agency of the Government of Great Britain, to which she had been requisition time-chartered by her owners for a period of several years. That said owners requested defendant Furness (Pacific) Limited to act for them as agents for the vessel after redelivery for the purpose of arranging for provisions, fuel, berthing, loading of cargo, and such repairs as should be requested by the Master.



That this request was not incorporated in any formal contract or agreement between said owner and said defendant.

3. That pursuant to this arrangement, defendant Furness (Pacific) Limited requested the San Francisco Stevedoring Company, plaintiff's employer, to furnish stevedoring services in connection with loading the vessel. That there was no formal contract or agreement between said defendant and plaintiff's employer, the understanding being that the Stevedoring Company would have full [9] charge of, and responsibility for, loading the vessel, subject only to the orders of the Master and Chief Officer.

4. That defendant Furness (Pacific) Limited was not at any time, by reason of agreement with said owners or otherwise, responsible for the navigation, material upkeep or repair of the SS Fordsdale.

5. That the Master and crew of the SS Fordsdale were employees of the owners of the SS Fordsdale; that said crew at all times referred to in the complaint herein was the same as had been employed while the vessel was under requisition time-charter as aforesaid and that defendant Furness (Pacific) Limited took no action in engaging said crew; that at all times referred to in the complaint herein the SS Fordsdale was solely in the possession

and under the control of her owners, and carried the flag of Great Britain.

JAMES WEST.

Subscribed and sworn to before me this 12th day of September, 1946.

[Seal]                      FRANK L. OWENS,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Acknowledgment of service.]

[Endorsed]: Filed Sept. 13, 1946. C. W. Calbreath, Clerk. [10]

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In the District Court of the United States for the  
Northern District of California, Southern  
Division

No. 26335-S

GEORGE THOMAS,

Plaintiff,

vs.

FURNESS (PACIFIC) LIMITED, THE  
BLACK & WHITE COMPANY, a corpora-  
tion, THE DOE COMPANY, JOHN DOE  
and RICHARD ROE,

Defendants.

MOTION TO ADD NEW PARTY DEFEND-  
ANT (RULE 21, FEDERAL RULES OF  
CIVIL PROCEDURE)

To defendants above named and to Messrs. Mc-  
Cutchen, Thomas, Matthew, Griffiths & Greene,  
their attorneys:

You, and Each of You, Will Please Take Notice

that plaintiff by his attorneys, Messrs. Gladstein, Andersen, Resner, Sawyer & Edises and Herbert Resner, Esq., will move the above-entitled Court in the Department of the Honorable A. F. St. Sure, Judge thereof, at his courtroom, Post Office Building, 7th and Mission Streets, San Francisco, on Monday, December 16, 1946, at the hour of 11 o'clock a.m., or as soon thereafter as counsel can be heard, for its order adding as a new party defendant in the above-entitled action Messrs. Shaw, Savill & Albion, Ltd., and for the issuance of summons against said named persons. [11]

Said motion will be based upon this notice, upon the Memorandum of Points and Authorities attached hereto, upon the affidavit of Herbert Resner, Esq., filed and served herewith, and upon all of the files, records, papers and proceedings in the above-captioned matter.

Dated, December 10, 1946.

GLADSTEIN, ANDERSEN,  
RESNER, SAWYER &  
EDISES,  
By HERBERT RESNER,  
Attorneys for Plaintiff.

## Memorandum of Points and Authorities

### I.

A new party defendant may be added to an action on motion of any party at any stage of the proceedings on such terms as are just.

Rule 21, Federal Rules of Civil Procedure;  
Moore's Federal Practice, Vol. 2, p. 2189.



II.

Additional or separate summons shall issue against any defendants upon request of plaintiff.

Rule 4(a), Federal Rules of Civil Procedure.

[Acknowledgment of receipt of copy.]

[Endorsed]: Filed Dec. 11, 1946. [12]

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[Title of District Court and Cause.]

AFFIDAVIT OF HERBERT RESNER

State of California,

City and County of San Francisco—ss.

Herbert Resner, being first duly sworn, deposes and says:

That he is the attorney for plaintiff George Thomas. That plaintiff is a stevedore who was injured aboard the SS Fordsdale on May 21, 1946, while the said vessel was docked at San Francisco Harbor. That plaintiff was injured as the result of the negligence of the owners, operators, charterers, or managers of said SS Fordsdale.

That affiant has been informed by counsel for Furness (Pacific) Limited, a defendant herein, that Messrs. Shaw, Savill & Albion, Ltd., of 88 Leadenhall Street, London, England, are, and at said time were, the owners of said SS Fordsdale. That it therefore appears that Messrs. Shaw, Savill & Albion, Ltd., are a necessary party to the within proceeding and should be added as a [13] party defendant herein.

Wherefore, affiant prays that the Court make and cause to be entered its order adding Messrs. Shaw, Savill & Albion, Ltd., as a party defendant herein and directing and ordering an additional summons to issue as against said defendant.

HERBERT RESNER.

Subscribed and sworn to before me this 10th day of December, 1946.

[Seal]                      DOROTHY H. McLENNAN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Acknowledgment of receipt of copy.]

[Endorsed]    Filed Dec. 11, 1946. [14]

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[Title of District Court and Cause.]

### ORDER OF COURT

The motion of plaintiff to add new party defendant came on for hearing before the above-entitled Court, the Honorable George B. Harris, Judge thereof, on Monday, February 24, 1947, and the Court having heard from counsel for the respective parties and being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered that the said motion to add new party defendant, to wit, Messrs. Shaw, Savill & Albion, Ltd., be and it hereby is granted.

It Is Further Ordered that the Clerk of the above-entitled Court issue, and he herewith is

ordered and directed to issue summons against the said Messrs. Shaw, Savill & Albion, Ltd.

Done in Open Court This 3rd day of March, 1947.

GEORGE B. HARRIS,  
Judge of the District Court.

[Endorsed]: Filed March 3, 1947. [15]

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[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR  
DAMAGES

Comes now the plaintiff and for cause of action alleges:

I.

That the defendants Furness (Pacific) Limited and Shaw, Savill & Albion, Ltd., are corporations or other forms of business association or organization, existing under and by virtue of the laws of states unknown to plaintiff, and do business and maintain principal places of business in the City and County of San Francisco, State of California, and are within the jurisdiction of the above-entitled Court.

II.

That the true names of the defendants sued herein as The Doe Company, John Doe and Richard Roe are presently unknown to plaintiff, and plaintiff prays leave to amend this complaint and insert herein said true names when ascertained.



## III.

That during all of the times herein mentioned the defendants [16] owned, managed, operated, navigated, maintained and controlled the British vessel SS Fordsdale, and employed and used said vessel in the transportation of freight and passengers for hire in interstate and foreign commerce.

## IV.

That on or about May 21, 1946, at or about the hour of 8 p.m., the said SS Fordsdale was docked at the port of Oakland, California, at the Encinal Terminals thereof. That at said time and place plaintiff was a business invitee of defendants and was present on said vessel in his capacity as a stevedore, plaintiff then and there being in the employ of the San Francisco Stevedoring Company, and was present on said vessel during and within the course and scope of his employment by said company, which then and there was engaged in working cargo aboard said vessel at the special instance and request and for and on behalf of defendants herein.

## V.

That at said time and place the defendants negligently and carelessly failed to safely and properly maintain said vessel its maindeck and the winches, appurtenances, gear and appliances of said vessel, and particularly the #1 hatch and winches at the said #1 hatch, and the decks in the vicinity of the said #1 hatch, in the following respects: defendants so negligently and carelessly maintained

the winches at the said #1 hatch that said winches leaked oil, which oil thereupon dropped to the maindeck in the vicinity of the said #1 hatch and upon the said #1 hatch, thereby causing said deck and hatch to be in a slippery, dangerous and unsafe condition. That at the said time and place the defendants negligently and carelessly failed to maintain proper and sufficient lights at the said #1 hatch, and the said deck in the vicinity of the said #1 hatch was dark and unlighted, and it was very difficult for plaintiff to see the place about which he was compelled to work aboard said vessel.

That the said vessel was unseaworthy in said respects, namely, in that there were insufficient lights present in the vicinity of the said #1 hatch to properly and safely light said deck at said place, and the [17] said winches were unseaworthy in that they leaked oil, which oil fell to and was present on the maindeck in the vicinity of the #1 hatch and on the #1 hatch; and the said vessel was unseaworthy in that the maindeck in the vicinity of the #1 hatch and the said #1 hatch were oily, slippery and failed to constitute a safe, proper and sufficient surface upon which plaintiff could work and walk while doing his work as a stevedore aboard said vessel.

That as a direct and proximate result of the negligence and carelessness of defendants, and the unseaworthiness of the said vessel, as aforesaid, plaintiff was unable to see where he was working at the time and place in question, and plaintiff was caused to, and he did, slip and fall on said oily deck

in the vicinity of the said #1 hatch and on the #1 hatch, and as a result thereof plaintiff suffered and incurred grievous and severe physical and bodily injuries, as follows: injury to plaintiff's back, injury to his right arm and elbow, injury to his right hand, and injury to his right hip.

That plaintiff at the present time does not know the exact extent of said injury, but is informed and believes and alleges that the injury to his back and right hip are permanent in character. That plaintiff has suffered severe and grievous physical and mental pain and suffering as a result of said injuries. That as a result of said injuries plaintiff has suffered general damages in the amount of \$25,000.

## VI.

That at the time of the aforesaid accident plaintiff was gainfully employed as a longshoreman and was earning wages in the sum of \$100 per week. That plaintiff has been unable to work as a result of said injuries from May 21, 1946, until the date hereof, a period of eight weeks, and plaintiff has thereby suffered special damages on account of wage loss in the amount of \$800, which sum and the whole thereof is presently due, owing and unpaid to him by the defendants.

Plaintiff is informed and believes and alleges that he will suffer further wage loss in the future as a result of said injuries, and plaintiff prays leave to amend his complaint and insert herein, or to offer proof thereof at the time of trial, the amount of such further [18] wage loss when ascertained.



## VII.

That as a result of said injuries plaintiff was caused to, and he did, secure the services of doctors, nurses, hospital, and incurred expenses for X-rays, medicines and medical supplies. That plaintiff does not know the exact cost of said medical services and supplies and prays leave to amend his complaint and insert herein, or to offer proof at the time of trial, said cost when same has been ascertained; and plaintiff also prays leave to amend his complaint and insert herein, or to offer proof at the time of trial, the amount of such other and further costs for medical services and expenses which he may incur and which he is informed and believes and alleges that he will incur in the future.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of \$25,800 plus cost of medical services and supplies, future wage loss and medical services and expenses, costs of suit herein, and for such other and further relief as is meet and just in the premises.

Dated, February 25, 1947.

GLADSTEIN, ANDERSEN,  
RESNER & SAWYER,  
By HERBERT RESNER. [19]

State of California,  
City and County of San Francisco—ss.

Herbert Resner, being first duly sworn, deposes and says:

That he is attorney for plaintiff in the within and foregoing amended complaint and that he makes this verification for and on behalf of said plaintiff for the reason that said plaintiff is presently out of the county in which affiant has his office; that affiant has read said amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on his information or belief, and as to those matters he believes it to be true.

HERBERT RESNER.

Subscribed and sworn to before me this 25th day of February, 1947.

ALICE C. MORSE,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed March 3, 1947. [20]

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND MOTION TO  
QUASH SERVICE OF SUMMONS UPON  
SHAW, SAVILL AND ALBION CO., LTD.,  
AND NOTICE OF HEARING SAID SPECIAL APPEARANCE AND MOTION

Defendant Shaw, Savill & Albion Co., Ltd., appearing specially herein and not otherwise, moves the court to quash the service of summons upon said defendant and the return of service of said summons and to dismiss the action as to said defendant for lack of jurisdiction of the person of said defendant on the grounds that:

(1) Said defendant is a corporation organized and existing under the laws of Great Britain and was not and is not subject to service of process within the State of California.

(2) Said defendant has not been personally served with a copy of the summons and complaint within the State of California.

(3) Service of a copy of the summons and complaint on James West, General Manager of Furness (Pacific) Limited, as recited in the return of service upon defendant Shaw, Savill and Albion Co., Ltd., is not effective service upon said defendant for the reason that said Furness (Pacific) Limited is not



an agent of defendant Shaw, Savill and Albion Co., Ltd., authorized by appointment or by law to receive service of process.

FARNHAM P. GRIFFITHS,  
McCUTCHEN, THOMAS,  
MATTHEW, GRIFFITHS &  
GREENE,

Attorneys for Defendant  
Shaw, Savill & Albion  
Co., Ltd.

To plaintiff herein and to Messrs. Gladstein, Andersen, Resner & Sawyer, his attorneys:

Notice is hereby given and you and each of you are hereby notified that on March 17, 1947, at the hour of 10 o'clock a.m. on said date or as soon thereafter as counsel may be heard, in the courtroom of the Honorable George B. Harris, Judge of the above entitled Court, situated in the Post Office Building at 7th and Mission Streets, San Francisco, California, defendant Shaw, Savill & Albion Co., Ltd., will call on for hearing and argument the above special appearance and motion to quash service of summons herein filed by said defendant.

Dated, San Francisco, California, March 11th, 1947.

FARNHAM P. GRIFFITHS,  
McCUTCHEN, THOMAS,  
MATTHEW, GRIFFITHS &  
GREENE.

[Acknowledgment of receipt of service.]

[Endorsed]: Filed March 11, 1947. [22]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF SPECIAL AP-  
PEARANCE AND MOTION TO QUASH  
SERVICE OF SUMMONS UPON DEFEND-  
ANT SHAW, SAVILL & ALBION CO., LTD.

State of California,  
City and County of San Francisco—ss.

James West, being first duly sworn, deposes and  
says:

That he is the manager of Furness (Pacific)  
Limited, purported to be served herein as agent  
for defendant Shaw, Savill & Albion Co., Ltd.;  
that he is familiar with such operations of said  
defendant as have been performed within the State  
of California; and that if sworn as a witness he  
could competently testify to the following facts:

(1) That defendant Shaw, Savill & Albion Co.,  
Ltd., is a corporation organized and existing under  
the laws of Great Britain; that said defendant is  
not now and never has been qualified to do business  
in California; that said defendant does not now  
own, and has never owned, any real or personal  
property in the State of California; that the prin-  
cipal offices of said defendant are in London, Eng-  
land; that vessels owned by said defendant have  
never called at California ports regularly or at all  
except as hereinafter set forth.

(2) That for several years prior to April 24,  
1946, the SS Fordsdale, owned by said defendant,  
was time chartered to the British Ministry of War

Transport, an agency of the government of Great Britain; that on April 4, 1946, on orders from said time charterer or of the authorized agent of said time charterer, the SS Fordsdale entered the harbor of San Francisco and moored at the United States Naval Supply Depot, Oakland, California; that on April 24, 1946, upon the expiration of said time charter said vessel was redelivered to said defendant; that on April 25, 1946, said vessel proceeded to Portland, Oregon, to load cargo for carriage to Great Britain; that on May 18, [23] 1946, said vessel returned to the port of San Francisco and moored at the Encinal Terminal, Alameda, California, to load additional cargo; that on May 22, said vessel, having loaded cargo, proceeded to the port of Los Angeles to load additional cargo; that said vessel loaded cargo at Los Angeles on May 24 and 25 and departed from Los Angeles on May 26, 1946, for Great Britain.

(3) That vessels owned by said defendant regularly operate in the trade between ports of the United Kingdom and ports of Australia and the Southwest Pacific.

(4) That Furness (Pacific) Limited acted as agent for the vessel only to the extent set forth in the affidavit of the undersigned dated September 12, 1936, and filed in, and made a part of the record of this case on September 13, 1946; that Furness (Pacific), acting as such agent, collected prepaid freight for the account of said defendant in the amount of approximately \$5,679; that all settlement of accounts for expenses of the vessel while



at California ports was concluded on or about August 10, 1946; that since said date defendant Furness (Pacific) Limited has had no dealings whatsoever with Shaw, Savill & Albion Co., Ltd., and has not acted, and does not now act, in any capacity whatsoever for and in behalf of defendant Shaw, Savill & Albion Co., Ltd.; that defendant Furness (Pacific) Limited has never acted as agent for, or on behalf of defendant Shaw, Savill & Albion at any time except as herein set forth.

(5) That no officer or other employee of defendant Shaw, Savill & Albion now resides or is physically present within the state of California or ever has been so resident in said State.

JAMES WEST.

Subscribed and sworn to before me this 18th day of March, 1947.

[Seal] CHALMER MUNDAY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Acknowledgment of receipt of service.]

[Endorsed]: Filed May 11, 1947. [24]

In the United States District Court for the  
Northern District of California, Southern Division

No. 26335-H

GEORGE THOMAS,

Plaintiff,

vs.

FURNESS (PACIFIC) LIMITED, SHAW,  
SAVILL & ALBION, LTD., THE DOE COM-  
PANY, JOHN DOE and RICHARD ROE,

Defendants.

ORDER  
(Proposed)

Defendant Furness (Pacific) Limited having moved herein for summary judgment, and defendant Shaw, Savill & Albion, Ltd., having filed its special appearance and motion to quash service of summons upon said defendant, and the court having examined the pleadings, affidavits and briefs and having heard testimony of witnesses called by the plaintiff and by the defendants, and the arguments of counsel, It Is Hereby Ordered:

(1) That the motion for summary judgment made by defendant Furness (Pacific) Limited be, and it hereby is, granted, and that the complaint herein, and it hereby is, dismissed as against said defendant with prejudice to the commencement of another action.

(2) That the motion of defendant, Shaw, Savill & Albion, Ltd., to quash the service of summons upon said defendant herein be, and it hereby is, granted [25] and the complaint herein is dismissed as against said defendant with prejudice to the commencement of another action in this or any other district within the State of California.

Dated, San Francisco, California, May 2nd, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Acknowledgment of receipt of service.]

[Endorsed]: Filed May 2, 1947. [26]



District Court of the United States, Northern  
District of California, Southern Division

At a Stated Term of the District Court of the  
United States for the Northern District of Cali-  
fornia, Southern Division, held at the Court Room  
thereof, in the City and County of San Francisco,  
on Friday, the 2nd day of May, in the year of our  
Lord one thousand nine hundred and forty-seven.

Present: The Honorable Michael J. Roche,  
District Judge.

No. 26335-R Civil

GEORGE THOMAS

vs.

FURNESS (PACIFIC) LIMITED et al.

ORDER GRANTING MOTION FOR SUM-  
MARY JUDGMENT MADE BY DEFEND-  
ANT FURNESS (PACIFIC) LIMITED,  
AND DISMISSING COMPLAINT AS  
AGAINST SAID DEFENDANT, WITH  
PREJUDICE, AND ORDER GRANTING  
MOTION TO QUASH SERVICE OF SUM-  
MONS HEREIN BY DEFENDANT SHAW,  
SAVILL & ALBION, LTD., AND DISMISS-  
ING COMPLAINT, WITH PREJUDICE

It is hereby Ordered that the motion for sum-  
mary judgment made by defendant Furness (Pa-  
cific) Limited be and it is hereby granted, and that  
the complaint herein be and it is hereby dismissed  
as against said defendant with prejudice to the

commencement of another action; that the motion of defendant Shaw, Savill & Albion, Ltd., to quash the service of summons upon said defendant herein be and it is hereby granted, and that the complaint herein is dismissed as against said defendant with prejudice to the commencement of another action in this or any other District within the State of California. [27]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS, NINTH CIRCUIT

To defendants above named and to Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, their attorneys:

Notice Is Hereby Given that George Thomas, plaintiff herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the orders of the District Court of May 2, 1947, granting the motion of defendant Furness (Pacific) Limited for summary judgment, granting the motion of defendant Shaw, Savill & Albion, Ltd., to quash service of summons, and from the order dismissing with prejudice the complaint herein, and ordering judgment for defendants.

Dated, July 3, 1947.

GLADSTEIN, ANDERSEN,  
RESNER & SAWYER,  
By HERBERT RESNER,  
Attorneys for Plaintiff  
and Appellant.

[Endorsed]: Filed July 5, 1947. [28]

[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

Comes now plaintiff herein, George Thomas, by his attorneys Messrs. Gladstein, Andersen, Resner & Sawyer and Herbert Resner, and designates the following papers, documents and records as the record on appeal herein, and requests the Clerk of the above-entitled Court and the reporter thereof to prepare such record and to file same with the Clerk of the Circuit Court of Appeals, as provided by the Federal Rules of Civil Procedure and the Rules of the Circuit Court of Appeals for the Ninth Circuit:

1. All of the pleadings, motions, orders, judgment, and records on file with the Clerk of said District Court, other than the briefs of the parties; and

2. A full and complete transcript of the testimony taken by the reporter on the hearing herein on defendants' various [29] motions to quash service of summons, for summary judgment, and to dismiss the complaint.

Dated, July 3, 1947.

GLADSTEIN, ANDERSEN,  
RESNER & SAWYER,  
By HERBERT RESNER,  
Attorneys for Plaintiff.

[Endorsed]: Filed July 5, 1947. [30]



[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefore, it is hereby Ordered that the Appellant herein may have to and including September 23, 1947, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated, August 14, 1947.

LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed Aug. 14, 1947. [31]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing to the Court therefor, it is hereby ordered that plaintiff and appellant may have to and including October 20, 1947, to file the record on appeal herein in the Circuit Court of Appeals for the Ninth Circuit.

Dated, September 23, 1947.

MICHAEL J. ROCHE,

Judge of the United States  
District Court.

Extension of time previously granted: 40 days.

[Endorsed]: Filed Sept. 23, 1947. [32]

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United States Circuit Court of Appeals  
for the Ninth Circuit

No. 26335-H

GEORGE THOMAS,

Plaintiff and Appellant,

vs.

FURNESS (PACIFIC) LIMITED, ET AL.,  
Defendants and Appellees.

PETITION FOR EXTENSION OF TIME TO  
FILE CLERK'S RECORD AND TRAN-  
SCRIPT

Comes now the plaintiff and appellant herein George Thomas by his counsel, Herbert Resner, Esq., and prays that the Court extend time until October 20, 1947, within which the Clerk of the

United States District Court for the Northern District of California, Southern Division, shall file the transcript and record on appeal herein.

Said petition is based upon the affidavit of Herbert Resner served and filed herewith.

Dated, September 30, 1947.

GLADSTEIN, ANDERSEN,  
RESNER & SAWYER,  
HERBERT RESNER,  
Attorneys for Plaintiff  
and Appellant.

So ordered:

WILLIAM DENMAN,  
Acting Senior United States  
Circuit Judge.

[Endorsed]: Filed Oct. 2, 1947. Paul P. O'Brien,  
Clerk.

A true copy, attest: Oct. 2, 1947. Paul P. O'Brien,  
Clerk.

[Endorsed]: Filed Oct. 3, 1947.

(Attached hereto is the affidavit of Herbert Resner in support of petition for extension of time, etc.) [33]



District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 33 pages, numbered from 1 to 33, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of George Thomas, Plaintiff, vs. Furness (Pacific) Limited, et al., Defendants, No. 26335-H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$10.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 17th day of October, A. D. 1947.

[Seal]

C. W. CALBREATH,  
Clerk.

/s/ M. E. VAN BUREN,  
Deputy Clerk. [34]

In the Southern Division of the United States  
District Court for the Northern District  
of California

Before: Hon. Michael J. Roche,  
Judge.

No. 26,335-H

GEORGE THOMAS,

Plaintiff,

vs.

FURNESS (PACIFIC) LIMITED, et al.,  
Defendants.

Friday, March 21, 1947

Counsel Appearing:

For Plaintiff: Herbert Resner, Esq.

For Defendants: Brent M. Abel, Esq.

MOTIONS TO QUASH SUMMONS, SUMMARY  
JUDGMENT, AND TO QUASH SUBPENA

---

JAMES WEST

called for the plaintiff; sworn.

The Clerk: Will you state your name to the  
court? A. James West.

Direct Examination

By Mr. Resner:

Q. What is your business or occupation?

A. I am Pacific Coast Manager of Furness (Pacific) Limited. [1\*]

(Testimony of James West.)

Q. What is Furness (Pacific) Limited?

A. A steamship agency.

Q. Does it operate any vessels of its own?

A. No.

Q. Does it own any vessels?                      A. No.

Q. When you say it is a steamship agency, what do you mean by that expression?

A. I mean this, a company that acts as agent for any number of shipowners, any one of whom might appoint us to act on their behalf to load or discharge vessels.

Q. Are your activities confined to the port of San Francisco, or do you operate in other Pacific Coast ports?

A. We operate in San Francisco and Los Angeles, and Vancouver, B. C.

Q. Is this concern of yours incorporated?

A. In Canada.

Q. Then it is a Canadian corporation?

A. A Canadian corporation.

Q. Has it been admitted to do business in California?                      A. Yes.

Q. And have you in this State and with the Secretary of the State of California designated an agent or a representative of your company to receive process in civil matters?

A. I can't answer that now, I don't know. [2]

Q. Is there anyone who does know that you can name?

A. I don't know. Perhaps my attorney can.



(Testimony of James West.)

Mr. Abel: I can answer that. No. Furness (Pacific) Limited has not designated an agent for service of civil process.

Q. (By Mr. Resner): Are you General Manager of Furness (Pacific) Limited in California?

A. Yes.

Q. Are there more than one Furness Companies?

A. In California, just the Furness (Pacific) Limited.

Q. Is there a partnership that is connected with Furness (Pacific)?

A. No.

Q. The only company is Furness (Pacific) Limited?

A. Yes.

Q. Is that right?

A. Yes.

Q. Who are the owners of that company in California?

A. Well, there are not any owners in California. It is a Canadian corporation and the stock in Pacific Furness is owned by stockholders outside of California. I own one share of stock, and I think there may be one other share of stock owned by a resident of California. I could not even answer that. I would have to go and look that up.

Q. But it is your understanding that the overwhelming majority of stock is owned by persons in Canada, is that correct, or [3] in England?

A. I could not answer that question, because I really don't know.

Q. Do you know the stock tie-up, for example, between the people who own Furness (Pacific) Limited and those who own Shaw, Savill & Albion, Ltd?

A. No.

(Testimony of James West.)

Q. You don't know that?

A. No. You would have to go to London to get that.

Q. Does your company do business in London?

A. Furness (Pacific) Limited does not. It only does business on this Coast.

Q. Is there any other Furness Company which does business in England?

A. There is a company known as Furness Withy & Company, Limited, London, but I don't know anything about Furness Withy & Company at all.

Q. Do you know whether the people who own Furness (Pacific) Limited also own Furness Withy & Company in England?

A. I could not answer that question, I do not really know.

Q. Is that information available to you?

A. I would say you would have to go to London to get that information.

Q. What I am asking is, could you get that information?

A. I don't know. I could try, but I don't know whether I would get it or not. I really could not answer that question. [4]

Mr. Abel: I object to this line of questioning. It does not seem to me to be relevant to any of the issues.

Mr. Resner: I think it will appear relevant as the case unfolds.

The Court: Proceed.

Mr. Resner: I will explain why I am doing this at the proper time.

(Testimony of James West.)

Q. Now, who are you responsible to, Mr. West, who are your superior officers, if any?

A. I have not any.

Q. Who makes the policy for the Furness (Pacific) Limited?

A. I do. Well, let me put it this way: the policy that we are following was made by the man I succeeded, J. J. Walsh, who is now general manager of Furness Withy & Company in New York. The policy that we follow was made by him. It is up to me to see that that policy is followed.

Q. The Furness Withy & Company in New York is the same company as Furness Withy & Company of London?

A. I could not answer that question, I don't know.

Q. All you know is it has the same name?

A. The same name.

Q. So that your instructions, if you need any, come from New York, from Furness Withy & Company?

A. Well, it depends on what the subject is about. As to acting as agent for Furness Withy & Company, I get instructions [5] from Furness Withy & Company in New York, on many matters—in some cases I get instructions from principals in London. But as far as the operation of Furness (Pacific) Limited is concerned, that is left in my hands.

Q. You do get instructions from principals in London?

A. Yes.



(Testimony of James West.)

Q. Which are the principals in London from whom you get instructions?

A. Furness Withy & Company; we are general agents on the Pacific Coast for Furness Withy & Company.

Q. Do you know the relationship between Furness Withy & Company and Shaw, Savill & Albion, Limited?      A. No.

Q. I want to direct your attention to the Fordsdale. You are familiar with that ship?

A. Yes.

Q. Do you recall when she was here last year?

A. Yes, she was here in April, 1946.

Q. According to this affidavit of yours, the Fordsdale entered San Francisco Harbor on April 4, 1946.      A. Yes.

Q. And you say that on April 24 the vessel was redelivered to the defendant Shaw, Savill & Albion Company, Limited.      A. Yes.

Q. Then you say that on April 25 the vessel proceeded to Portland, to load cargo for carriage to Great Britain.      A. That is right.

Q. That on May 18, 1946 the vessel returned to San Francisco and docked at the Encinal Terminal over in Alameda County to load additional cargo.

A. That is right.

The Court: Would you be good enough to give me those dates again? .

Mr. Resner: On April 4, 1946 the vessel entered San Francisco Harbor and moored at the United States Naval Supply Depot at Oakland. On April

(Testimony of James West.)

24, 1946 the vessel was redelivered to the defendant Shaw, Savill & Albion Company, Ltd. Prior to that time, according to Mr. West's affidavit, the vessel having been on time charter from its owners, Shaw, Savill & Albion Company, Ltd. to the British Ministry of War Transport, was redelivered on April 24, 1946 at San Francisco.

The Court: Is that correct?

A. That is correct, she was redelivered to her owners on April 24th. I don't know whether the ship was on time charter, or not. She was under requisition, I believe.

Mr. Resner: Of the British Government?

A. Yes.

Q. The time charter, or whatever it was that the British Government had on this ship, terminated on April 24, 1946, when the owners took her over?

A. Yes. [7]

Q. Then on April 25, 1946 the vessel proceeded to Portland, Oregon, to load cargo for Great Britain and then she returned to San Francisco harbor and moored at Encinal Terminal on May 18, 1946. Is that correct?

A. Yes.

Q. To load more cargo? A. Yes.

Q. And then on May 22nd, having loaded cargo, she proceeded to the port of Los Angeles to load additional cargo; that the vessel loaded cargo at Los Angeles on May 24th and 25th, and then departed from Los Angeles on May 26th, 1946, for Great Britain. Is that correct?

A. Correct.

Q. And from your reading of our pleading you

(Testimony of James West.)

know we claim that Mr. Thomas, the stevedore in this case, was injured on this vessel on May 21, 1946, when she was docked at Encinal Terminal. Is that correct?      A. Yes.

Q. Now, with regard to that loading operation over there at Alameda County when Mr. Thomas was injured, and as a matter of fact all of the time that she loaded cargo in San Francisco, you had that vessel under your supervision, is that correct?

A. We ordered stevedores and arranged berth on behalf of the owners of the ship.

Q. Let us get those matters. You got a berth for her at— [8] let us go back to the beginning. When she came to the United States Naval Supply Depot at Oakland on April 4, did you have anything to do with arranging that docking?      A. No.

Q. She was still with the British Government then?      A. That is right.

Q. On April 24 she was redelivered to Shaw, Savill & Albion Company, Limited?

A. That is right.

Q. Did you have anything to do with that redelivery?

A. Yes, we took redelivery from the British Government on behalf of Shaw, Saville & Albion Company, Ltd.

Q. When you took redelivery, what do you mean by that expression?

A. We signed a receipt to the British Government on behalf of Shaw, Savill & Albion Company, Limited, that the vessel was delivered to us, off the requisition at a certain time.



(Testimony of James West.)

Q. Have you got that receipt?

A. There is a copy of it in the file.

Mr. Resner: May I see it?

Mr. Abel: Yes.

Q. (By Mr. Resner): I hand you here what Mr. Abel tells me is the document, which purports to be a redelivery. A. Yes, that is it.

Q. Signed by Furness (Pacific) Limited for the owners? A. Yes. [9]

Mr. Resner: May I read this into the record, so that the respondent can have it back?

The Court: Yes.

Mr. Resner: This is Form T. 509 (Revised November, 1945). Discharge from H. M. Service of the S S Fordsdale. Port San Francisco, Calif. Date April 24, 1946.

“Part I—Notice of Discharge. Notice is hereby given that the above merchant ship, being no longer required for H. M. Service, is redelivered to and is at the disposal of the owners as from 5 p. m. on this 24th day of April, 1946.”

It is signed by F. G. Archbold.

Q. Is that right, Mr. West?

A. That is right.

Mr. Resner: Who signed himself as acting for Salvage Association, London, for Ministry of War Transport. That is correct?

The Witness: That is right.

(Testimony of James West.)

Mr. Resner: "Part II. Bunker fuel.

"It is hereby certified that at the time stated above there were 1080 tons of fuel oil remaining on board.

"It is agreed by W. O. T. and Furness (Pacific) Limited, Agents for the owners, that vessel's off survey is to be held at a future date, the time and place of which is to be agreed upon between the Shaw, Savill & Albion [10] Company and the W. O. T. in London. For and on behalf of owners Furness (Pacific) Limited, as agent (for owners C. E. Holland)."

It is signed for Ministry of War Transport by F. G. Archbold.

Q. By the way, who is Mr. Archbold?

A. He is a marine surveyor.

Q. Of San Francisco?

A. He was in San Francisco at that time. He was representative at that time of the London Salvage Association, which redelivered the ship on behalf of the Ministry of War Transport.

Q. Was that the association which made arrangements to redeliver various ships the British Government had during the war to the owners?

A. Yes.

Q. Was he in California and in San Francisco at the time?      A. He was.

Q. I mean was that his job here at the time?

A. No, he was Lloyd's Surveyor at that time,

(Testimony of James West.)

and he acted for the Salvage Association to redeliver all ships that were redelivered, off requisition.

Q. Do you know if Shaw, Savill & Albion, Ltd. was a member of the Salvage Association of London?      A. I would not have any idea.

Q. Or Furness Withy & Company? [11]

A. I could not answer that.

Mr. Resner: "Note: This form is to be prepared in triplicate by the person redelivering the ship on behalf of the Ministry of War Transport.

"For ships redelivered in the United Kingdom, copies should be disposed of as follows: One copy to owner's representative. One copy to Assistant Secretary A. T. Gen. Division, Ministry of War Transport, Berkeley Square House, London, W. 1. One copy to Finance Division (F2) Ministry of War Transport, Grand Hotel, Blackpool.

"For ships redelivered abroad, copies should be disposed of as follows: One copy to owner's representative. Two copies to the Salvage Association, Lloyd's Building, Leadenhall Street, London.

"D50083-1, 40,000 D-d 1072, 1-46."

Q. This is the copy of the paper that you have kept here as a part of your file?      A. Yes.

Q. Now, where did you get your instructions to take over the Fordsdale?

A. We got them from Shaw, Savill & Albion, Limited.

Q. Directly or through Furness Withy & Company?



(Testimony of James West.)

A. I could not answer that question, but the file is right there. There is a wire in it from either Furness Withy & Company or from Shaw, Savill & Albion. [12]

Mr. Resner: At this time, we might save time, Mr. Abel, if I might look through the papers which I have subpenaed here. Have you any objection?

Mr. Abel: No.

The Court: We will take a recess for a few minutes.

(After recess:)

Mr. Resner: During the recess, Mr. West, I have gone through this file that you have kindly brought to the court, you and Mr. Abel, and there are some things which I think could help us in getting some light on this case. For example, there is here a document which is on the letterhead of Shaw, Savill & Albion Company, Ltd. and Aberdeen & Commonwealth Line, and I will ask you to tell us what that is, please.

A. I would say that was a seaworthy certificate, a number of which are supplied to every vessel, and it is filled out by the various mates and signed by the master, showing that everything is in good order and condition at the time the vessel leaves its last port.

Q. This was at the port of Los Angeles on the 26th of May, 1946?

A. That would be the leaving date from Los Angeles.

(Testimony of James West.)

Q. How do you happen to have this copy?

A. Because it is made out in duplicate and one copy is kept in our file in San Francisco.

Q. It was furnished to you by the master, I take it?

A. It was filled out on the ship, the forms are on the ship, [13] we do not have them.

Q. Mr. Ireland is the ship's master?

A. Yes.

Q. He signs this and sends it up to you?

A. Yes.

Q. The file which I hold in my hand is your file?

A. Yes. In all probability it was sent on to the owners in London.

Mr. Resner: I do not want to take this file away from respondent, here, but may this be considered as a document in evidence in this matter?

Mr. Abel: That is agreeable.

Mr. Resner: So that if we need it it is now sufficiently identified.

Mr. Abel: Suppose we number it for identification.

Mr. Resner: Let us give it No. 2, and the first document I read from No. 1.

(The redelivery form is marked Plaintiff's Exhibit 1 and the Seaworthy certificate No. 2, both for identification.)

Q. (By Mr. Resner): Now, during the course of time that you were working in connection with the Fordsdale you got a great many of the orders, as I understand it, from Furness Withy & Company in London?

(Testimony of James West.)

A. Practically everything that went on in the ships for the owners was relayed to us by Furness Withy & Company, in London. [14]

Q. As I understand the picture here, you got information that the Fordsdale was coming to San Francisco.

A. We got that from the British Ministry, first.

Q. Thereupon you communicated with London asking them to secure for you in San Francisco the agency for the ship.

A. Very probably that is what we did.

Q. And Furness Withy & Company thereupon communicated with Shaw, Savill & Albion in London and secured for your San Francisco concern the agency to handle this ship while she was in San Francisco, and in fact on the Pacific Coast?

A. Yes.

Q. Because your operations extended up and down the Pacific Coast?      A. Yes.

Q. Is that a correct statement?

A. That is correct.

Q. You also had some correspondence directly with the owners, Shaw, Savill & Albion?

A. I think most of that correspondence was up until the time that we took delivery from the British Government, up to and including the delivery from the British Government. I do not believe we had much, if any, correspondence with Shaw, Savill & Albion after we took the ship off of requisition.

Q. She was taken off requisition on the 24th of April?



(Testimony of James West.)

A. That is right. You may find that we may have sent something to Shaw, Savill & Albion, and they may have acknowledged it, [15] the seaworthy certificate, loading certificate, or Notice of Sailing.

Q. I want to direct your attention to this particular letter of the 29th of May, 1946, to your company, from Furness Withy & Company, Ltd., in London, in which they refer to certain advices they had from Shaw, Savill & Albion, in London, is that right?

A. That is right.

Q. This kind of a letter is typical of other correspondence that you had with Furness Withy & Company, Ltd., of London, concerning the handling of the Fordsdale?

A. That is right. They are all in there.

Mr. Resner: May this letter of May 29, 1946 be marked Plaintiff's Exhibit 3 For Identification?

The Court: Very well. Let it be admitted and marked.

Mr. Resner: If you have no objection we can consider these documents in evidence.

Mr. Abel: I have no objection.

(Letter from Furness Withy & Company, Ltd. to Furness (Pacific) Limited dated May 29, 1946, was marked Plaintiff's Exhibit 3 in evidence.)

Mr. Resner: There are several other papers which I would like to call your attention to. Is that a teletype communication?

A. That is a cable. [16]

(Testimony of James West.)

Q. A cable communication with London about this particular operation?

A. Yes. Those are teletypes that you are turning over.

Q. And concern the handling of the ship between your company here and London?

A. The teletypes are with Seattle and Portland, and the cables are with London.

Q. Did your San Francisco Company have the main charge of the ship?

A. San Francisco is the head office on the Pacific Coast.

Q. Here, for example, on the 24th of May, 1946, is a letter addressed to Furness (Pacific) Limited, 220 Bush Street, San Francisco, 6, California, which your office had from Shaw, Savill & Albion Company, Ltd., wherein they state:

“Dear Sirs: Fordsdale

We would thank you for your letter of the 2nd instant, enclosing two copies of Lloyd's RMC certificate, loading certificate and seaworthy certificate.

Yours faithfully,

Shaw, Savill & Albion Co. Limited,

Ralph Hulser, Secretary and  
Assistant Manager.”

That letter refers to the seaworthy certificate which you have produced?

A. No, it does not, because that in all probability—I couldn't say definitely, but I don't think it does,

(Testimony of James West.)

because [17] this is long after that this was written, and this seaworthy certificate would not have been sent to them until after the ship sailed from Los Angeles, whereas this certificate which is probably a seaworthy certificate, when the vessel got repairs to her machinery, or something of that nature, and probably this could have taken place about the time the ship came off the requisition.

Mr. Resner: Very well, I will offer this letter as Plaintiff's Exhibit 4, if your Honor please.

The Court: It may be admitted and marked.

(The letter of May 24, 1946, from Shaw, Savill & Albion Co., Limited to Furness (Pacific) Limited was marked Plaintiff's Exhibit 4.)

Q. (By Mr. Resner): You had considerable correspondence with the master, also, which appears in this file?      A. Yes.

Q. For example, I show you a letter dated May 23, 1946, to Mr. McKeever, of your company, signed by the master, in which he refers to certain work being done, is that right?      A. That is right.

Mr. Resner: I will offer this as Plaintiff's Exhibit 5.

The Court: It may be admitted and marked.

(The letter from the Master to Mr. McKeever dated May 23, 1946, is marked Plaintiff's Exhibit 5.)



(Testimony of James West.)

Q. (By Mr. Resner): Now, I show you four documents signed by [18] the master, can you tell us what they are?

A. I think they are duplicates, aren't they? Yes, they are duplicates. These are seaworthy certificates that we have the ship's officers sign when they leave to show that the ship is in seaworthy condition.

Q. I see. The situation is this, that the master or the licensed officers of the vessel make out this certificate which sets forth in their opinion the vessel is seaworthy? A. Yes.

Q. And they leave it with you? This is required by British law or custom?

A. It is required because under British law the head of the company, if the ship goes to sea, is not responsible; that is proof that it is seaworthy.

Q. They have the ship's officers make out the certificate, so that they meet it in that way?

A. Yes.

Mr. Resner: I will offer this certificate of seaworthiness by the vessel's master next in order.

The Court: It may be admitted and marked.

(The seaworthy certificate was marked Plaintiff's Exhibit 6, in evidence.)

Q. (By Mr. Resner): While the ship was here, Mr. West, certain repairs were made, weren't there?

A. Yes, there were some repairs made. [19]

Q. Did you arrange for the making of those repairs?

(Testimony of James West.)

A. We arranged for them on behalf of the chief engineer and the master.

Q. Do you know where the repairs were made?

A. I believe they were made on board the ship at Encinal Terminals. The ship did not go anywhere to have repairs made.

Q. That is, she did not proceed to any shipyard, or any drydock?      A. No, sir.

Q. You paid for those repairs?

A. Yes, we paid the bills for those repairs on behalf of the owners.

Q. Where did you get the money?

A. We got some of the money from prepaid freight, and the rest of the money must have been remitted to us by Furness Withy & Company, of London.

Q. They sent it to you?      A. Yes.

Q. When you got this money you not only paid for the repairs on the ship, but you paid also for the stevedore work?      A. Yes.

Q. And this loading that had to be done—in fact, anything in connection with serving the work of the ship?

A. That is the way it would be worked.

Q. In other words, your company, as I understand it, hired [20] this stevedore company?

A. Correct.

Q. Do you know which stevedore company it was?      A. San Francisco Stevedore Company.

Q. And that was the company that Mr. Thomas was employed by?      A. Yes.

(Testimony of James West.)

Q. Did you have a regular working arrangement between Furness (Pacific) Limited and the San Francisco Stevedore Company?

A. We did before the war; we had a contract with them before the war. During the period that the Fordsdale was working we were working under the WSA, because all during the war those bills were paid under lend-lease, and since the war it was discontinued and we have a new contract with the San Francisco Stevedore Company, but we did not have at that time.

Q. I want to show you this document, which is a telegram or radiogram which confirmed your agency, is that right?

A. No, that is a cable that came from the Pacific Steam & Navigation Company, and it asked us to confirm that the Fordsdale was entering into their agency and the expenses would be paid by Furness-Withy and not Shaw, Savill & Albion.

Q. Who was Pacific?

A. That is Pacific Steam & Navigation Company, who handled the passage of the ship through the canal; in other words, if a Furness-Withy ship goes through the Panama Canal the Pacific Steam & Navigation Company paid the cost of transit out of [21] Furness-Withy funds; if a Shaw, Savill & Albion ship went through the canal and they acted as agent they would pay out of Shaw, Savill & Albion funds.

Q. Here is another dated May 17.

A. Expected time of arrival.



(Testimony of James West.)

Q. At San Francisco? A. Yes.

Q. This was sent from Portland?

A. This message came down from Portland.

Q. She went to Portland to load meat?

A. Yes.

Q. You arranged for that loading of meat?

A. Yes.

Q. This is a refrigerator ship A. Yes.

Q. In what hatches did she carry dry cargo?

A. No. 1, I believe.

Q. That was the hatch that was loaded at San Francisco?

A. Well, of course, they may have worked in some of the other hatches at San Francisco, too; I think we did handle some general cargo—I have forgotten the exact details, but we worked more than one hatch in San Francisco.

Q. Your file, here, carries detailed instructions about the loading of this ship; there are, for example, your instructions that went between your office here and Portland, and similar [22] instructions between your office and Los Angeles?

A. That is right.

Q. In other words, you told both places how to load the ship?

A. We laid the ship out here with the captain and with our marine superintendent, who was down here from Vancouver.

Q. That is, you made the plan as to where the cargo would go? A. That is correct.

(Testimony of James West.)

Q. You made that plan with the master and with your marine superintendent of Furness (Pacific)?

A. Yes.

Q. There appears in this file, also, Lloyd's Register of Shipping, certificate for refrigerating machinery. Is this also something required by law?

A. This is required by law. These are the certificates that that previous letter referred to.

Q. These are certificates that are required by British law?

A. They are required by law and for classification. This was a refrigerated ship. You cannot put anything in your refrigerator chambers until you get that. One is the condition of the chambers, and the other, I think, is the condition of the machinery, and this is a seaworthy certificate which says that she be as now classed without fresh record of survey, subject to leaky rivets in after stringer angle. Forepeak being renewed at next drydocking. Those are the certificates that that previous letter referred to. [23]

Q. You had seen these, I take it?

A. These would go directly to the owners of the ship and not to the agents—they would go to the owner's superintendent.

Mr. Resner: May these certificates be received as Plaintiff's Exhibit next in order?

The Court: They may be admitted and marked.

(Lloyd's Register of Shipping certificates are marked Plaintiff's Exhibit 7, in evidence.)

(Testimony of James West.)

Q. (By Mr. Resner): You sent these directly to Shaw, Savill & Albion?

A. We would do that; if we sent them to Furness, Withy & Company in London, it would be just a waste of effort.

Q. They would in turn have to remit them to the owner?      A. Yes.

Mr. Abel: Your Honor, I might be able to shorten this a little bit. We have been going through this file quite a little. We are willing to stipulate that Furness (Pacific) Limited made all of the arrangements for this vessel that were necessary on this coast. The issue that arises is as to whether there was any responsibility on the part of Furness (Pacific) for what went on internally in the ship. Our position is there was not. I think we have enough from the file now to put that issue squarely before the court.

Mr. Resner: I am not familiar with the file.

The Court: I can see that counsel has in mind trying to [24] build up a case here, and since there was someone injured I have allowed the widest latitude in the matter, but I do not see that you and counsel will have any difficulty in agreeing what the factual situation is in relation to it.

Mr. Resner: Might we do this, Mr. Abel, in order to shorten the matter, can we have a stipulation that this file may be considered as having been read into the record here and his Honor peruse it at his leisure?

The Court: No. I cannot do that.

Mr. Abel: I would stipulate this, that whatever



(Testimony of James West.)

is in that file you wish to have introduced in evidence as part of the record may be introduced, provided that if in the course of our discussion on it we cannot agree, then we may bring that matter up with the judge.

Mr. Resner: Very well, that is all right. I will try to speed this along. I will just refer to these things without trying to elaborate on them.

Q. I draw to your attention, Mr. West, a letter of May 1, 1946 to your company here, also from Shaw, Savill & Albion Company, Limited, at London. A. Yes.

Q. I will show you next the list of repairs that we previously talked about. A. Yes.

Q. I show you next a letter of April 25, sent by you, Furness [25] (Pacific) Limited, to Shaw, Savill & Albion Co., Limited, at London.

A. Yes.

Q. There is another letter here dated April 9, 1946, to Shaw, Savill & Albion, of London.

A. That was written in connection with the taking over from requisition.

Q. Of the ship? A. Yes.

Q. And here is a wire dated April 5, 1946, to Shaw, Savill & Albion, London, by Furness (Pacific). A. Yes.

Q. And here is a wire to Furness (Pacific) from Furness-Withy in London, dated April 5, 1946, also with regard to the turning over? A. Yes.

Q. And here is a wire to Furness (Pacific) from Shaw, Savill & Albion, dated April 4, 1946, with regard to the same subject? A. Yes.

(Testimony of James West.)

Q. And this is the long wire that you previously referred to, dated April 3, 1946, to Furness (Pacific) from Portland, the master of the ship?

A. No, that is from Shaw, Savill & Albion.

Q. There is a three-page wire giving details concerning the requisitioning of the vessel. [26]

A. Yes.

Q. The other one is the arrival time?

A. Yes.

Mr. Resner: I am not asking that these be marked separately, but if we could consider this file in evidence before the court then on argument we can direct your Honor's attention to it. Would that be satisfactory?

The Court: That is satisfactory.

Mr. Abel: We have stipulated that this whole file is in evidence, and I think that Mr. Resner and I can get together on a number of these items, now that they have been called to Mr. West's attention, and I will stipulate to doing that, and if any objection arises I will reserve the right to object.

The Court: Very well.

Q. (By Mr. Resner): I see that in your file here you advised Furness-Withy in London concerning the accident to Mr. Thomas. You have had some correspondence with Furness-Withy concerning who would defend, is that correct?

A. I have had some, yes.

Q. And there is a letter here wherein they say under the circumstances they will take the matter up with the owners as to a determination of who would handle the claim, is that correct?

(Testimony of James West.)

A. I believe that is correct, I do not remember off-hand.

Mr. Abel: I won't stipulate to admit any correspondence in that file that has to do with this case.

Mr. Resner: Then probably I should offer that and let his Honor rule on it.

The Court: It will be admitted for the purpose of identification, to be used by either side for any purpose they see fit.

Mr. Abel: All of these items are privileged.

Mr. Resner: I am not trying to put in any privileged communication, so I won't offer that.

Q. Here is a letter dated June 26, 1946, to Furness, Withy & Company, Limited, London, concerning the accident to Mr. Thomas.

A. Yes, that is right.

Q. And then on July 1, 1946, a letter written by Furness, Withy & Company, Limited, in which it mentions what would be done about handling this matter.

A. That is right.

Mr. Resner: If your Honor please, I will offer these two letters in evidence.

The Court: They may be admitted and marked.

(The letter of June 26, 1946, from Furness (Pacific) to Furness, Withy & Company, Limited, London was marked Plaintiff's Exhibit 8, and the letter from Furness, Withy & Company, Limited, London, to Furness (Pacific) Limited, dated July 1, 1946, was marked Plaintiff's Exhibit 9.)



(Testimony of James West.)

Q. (By Mr. Resner): Now, Mr. West, as I understand it when this vessel was here you arranged to load her, to repair her, to get berthing facilities for her, take care of these documents [28] which relate to the seaworthiness of the vessel and transmit those to the owners, pay the bills for which you got the money from your principals in London, Furness, Withy & Company, who in turn got it from Shaw, Savill & Albion, took care of all of the business of the ship while she was in California, and in turn arranged for all of the business which took place in Portland or any place else on the Pacific Coast. Would that be a fair statement?

A. That would be the general responsibility of a ship's agent.

Q. The things that I enumerated?

A. Yes.

Q. Would that be a fair statement?

A. Yes.

Q. Is there anything that I have left out which you can add to what you did for the ship?

A. The responsibility of a ship's agent is really very well defined by, we will say, the local agent's association here in San Francisco. They put out a form that lists the duties and responsibilities of a ship's agent. There is any number of them. I mean you may have overlooked a few details but a ship's agent's responsibility is to take care of the ship and its cargo on behalf of the owners of the ship; when I say take care of the ship, I mean the

(Testimony of James West.)

repair of the ship, loading of cargo, or the discharge of the cargo, and everything attendant [29] thereto.

Q. Then you employ and pay the stevedores, too?

A. Yes, that is correct, but we do it all for and on behalf of the owner.

Q. All of the bills of lading and all the other documents that were signed were so done by Furness (Pacific) Limited on behalf of Furness, Withy & Company, owners Shaw, Savill & Albion?

A. I could not say whether Shaw, Savill & Albion is on the bottom of the bill of lading, but all bills of lading signed by an agent are for and on behalf of the owners. It may not state that the owner is Shaw, Savill & Albion, or it may. When we sign it for and on behalf of the owners it means the registered owners of the ship.

Q. Now, the days of April 24 through May 26, 1946, were the days on which you handled this ship?

A. That is correct.

Q. For the owners? A. Yes.

Q. On the 21st of May the man was hurt, that is, five days before the vessel departed for Great Britain?

A. Actually the ship was in our care and custody, you might say, from April 24 to May 26.

Q. April 24 to May 26? A. Yes. [30]

Q. Those are the dates I have given. You say something about a local agents association.

(Testimony of James West.)

A. There is a local agents association here in San Francisco. I cannot tell you just exactly who they are, because we are not a member of the association, but they have a regular formula that they pass out to prospective clients, we will say, listing the duties of an agent, and how much the agent will get for performing those duties.

Q. Those are the duties that your company performs, too?      A. Yes.

Q. You are not a member?

A. We are not a member, but we also perform the same duties, you might say.

Q. You are a member of the Waterfront Employers' Association of the Pacific Coast?

A. Yes.

Q. That is an association which is composed of shipowners as well as shipowners' agents?

A. Yes, and stevedore companies.

Q. And stevedore companies, also?

A. Yes.

Mr. Resner: I think that is all.

#### Cross-Examination

By Mr. Abel:

There are a few details I would like to bring out. What was the first information that you had, Mr. West [31] about the Fordsdale call at this port?

A. The British Ministry of War Transport received a wire from the United States Navy saying that the Fordsdale was coming to San Francisco to discharge, and the Ministry of War Transport



(Testimony of James West.)

wired the owners the vessel would be redelivered as and when the cargo was out.

Q. She was not ordered here in any case by her owners?

A. No. She was under requisition and subject to orders from the United States Navy, I believe.

Q. Did you have any written agreement with the owners of the Fordsdale regarding agency?

A. No.

Q. As to the crew of the vessel, by whom were they employed?      A. Shaw, Savill & Albion.

Q. Were they paid while they were here?

A. No, they were not paid by Furness (Pacific) Limited. If any advances were made to the crew we would not have known anything about it, because we would have made the advances to the master at his request, and what he did with the money we would not know.

Q. What was the berth at which the Fordsdale was moored while she was under your agency, that is, after the redelivery?

A. After the redelivery or during the loading of the ship?

Q. Well, both.

A. Well, she was redelivered to us at the Navy Supply Depot [32] in Oakland, and she sailed from the Navy Supply Depot in Oakland for Portland, and when the ship came back to San Francisco Bay she docked at Encinal Terminal, Alameda, which is a public utility, to load this cargo.

(Testimony of James West.)

Q. Furness (Pacific) had no lease on that pier, or anything of that kind?

A. No. As a matter of fact, Furness (Pacific) did not direct the ship to Encinal Terminals. The ship was directed to Encinal Terminals—put it this way—Furness (Pacific) had to direct the ship to wherever the British Government had its cargo, and the cargo was at the Encinal Terminal and it went to Encinal Terminal to load it because the British Government had stored its cargo there.

Q. Did the Furness (Pacific) prescribe any repairs to the vessel?

A. Furness (Pacific) did not prescribe any repairs. The repairs made were at the request of the chief engineer and approved by the master.

Q. In other words, the responsibility for making the repairs was with whom?

A. The chief engineer or the master, if it happened to be a deck repair or a tank cleaning job.

Q. Did you or anybody from your organization inspect any of the repair work that was done here?

A. No, we are not qualified. If it was classification repair [33] work it would be inspected by a Lloyd's Surveyor, and the chief engineer, and Lloyd's Surveyor would issue a certificate, if it was not classification work, just ordinary voyage repairs, the chief engineer would approve them.

Q. Do you recall approximately what proportion of the total homeward cargo was loaded here, that is in California ports, as distinguished from Portland?

(Testimony of James West.)

A. Well, I do not recall, but I would say it was less than 20 percent of the total cargo that was loaded here at San Francisco.

Q. Was it loaded after redelivery, or before?

A. All homeward cargo was loaded after redelivery.

Q. Under whose direction were the stevedore operations, Mr. West?

A. On a British ship the chief officer directs the stevedore operations. That is so on all British ships. It is in charge of the chief officer and the master. We have a liaison man between the chief officer and the stevedores.

Q. The final responsibility for distribution of cargo for stability purposes depends upon you or upon the master?

A. It depends upon the master of the ship. He works it out in conjunction—generally speaking the master of the ship and the chief officer of the ship work out the details and in conjunction with either our marine superintendent or the liaison officer, depending upon who may be there, he relays [34] them to the stevedores.

Q. So that any instructions you might give to your people in Los Angeles would be merely suggestive to the master and not mandatory?

A. Well, they would have originated with the ship in the first place; any ideas we passed to either Portland or Los Angeles were discussed with the ship before we did it.

Q. So you were really relaying the master's instructions in those instances?



(Testimony of James West.)

A. That is right. We were telling the people in Los Angeles to prepare to put cargo in certain spaces where the master required it be put.

Q. Now, are Shaw, Savill & Albion qualified to do business in California? A. No.

Q. Do they have any office in California?

A. No.

Q. Do they own property here?

A. No. I say "No" to the best of my knowledge.

Q. If they did would you know that?

A. No—I might or I might not—I probably would not. I know they are not set up to do business in the State of California because Shaw, Savill & Albion have never had a ship here before.

Q. What is the regular route operated by Shaw, Savill & Albion [35] vessels?

A. London to Australia, or London to South Africa, or Australia and New Zealand.

Q. Have they ever had a vessel in California before?

A. As far as I know they never had one. I have been here 24 or 25 years and we have never acted as agent for them before. If they ever had a ship before we did not handle it.

Q. How long have you been with Furness (Pacific)—I believe you have already answered that.

A. 24 years.

Q. Do you have any relations, whatever, with Shaw, Savill & Albion, I mean as distinguished from when that vessel was here? A. No.

Q. When did this transaction wind up?

(Testimony of James West.)

A. August 19, 1946, when we sent the final account to Furness-Withy in London.

Q. And since that time you have had no dealings with them on any other matters?

A. Only to notify them of the suit of Mr. Thomas; aside from that, we have not had any dealings with them at all.

Q. Did Furness (Pacific) at any time since the filing of this suit, hold funds that belonged to Shaw, Savill & Albion?      A. No.

Q. What about prepaid freight?

A. I think the prepaid freight was all disbursed long before [36] this suit was filed—When was this suit filed?

Q. This suit was filed in July.

A. The ship sailed in May and the prepaid freight that would be received would have been disbursed long before July, because we had to pay bills. As soon as you collect the prepaid freight you start paying bills.

Q. Might I refresh your memory a little? When I first discussed this case with you in July, shortly after process was served, you told me then that there was some prepaid freight still on hand at that time that had not been yet forwarded.

A. Well, I will change that and say we did have \$14,000, we probably had \$14,000 credit on the books for account of Shaw, Savill & Albion, but we had been paying Shaw, Savill & Albion bills out of our own pocket. You have to pay bills within a reasonable time. They had a credit in prepaid freight of \$14,000, and that credit remained there until the

(Testimony of James West.)

account was finally settled, but actually there was no Shaw, Savill & Albion cash at that time.

Q. Because what you had collected was earmarked to pay bills? A. Yes.

Q. On account of the vessel? A. Yes.

Q. In so far as you know, Mr. West, did any of your employees have any knowledge of the circumstances of this accident, at all?

Mr Resner: I think that is immaterial. [36]

The Court: I will allow the question.

A. The answer is No.

Q. (By Mr. Abel): What was the first knowledge that you had of the accident?

A. A friend of mine in Balfour Guthrie & Company was served with a summons and he told me that I was about to be served with it, because he had referred the attorney to me. I then wrote to London and got in touch with the stevedore company, and the stevedore company told me that Mr. Thomas had been injured.

Q. No accident report ever came to your attention?

A. No; prior to that time I did not know a thing about it.

Mr. Resner: I might say, your Honor, that the War Shipping Administration informed me that the company that had the Fordsdale was the Donaldson & Company Line of London, for whom Balfour Guthrie & Company were agents. I pursued this for about ten days before I finally found out who it was. It is twelve o'clock now, and I am going to ask an adjournment, because we have two



(Testimony of James West.)

gentlemen, one from the Longshoremen, and one from the International Union, as we want to present the situation from the union's point of view. We think it is very material.

Mr. Abel: I would like to know how Mr. Resner reaches that result, because my feeling is that any material of that nature is strictly a red herring. [37]

The Court: Have you finished with this witness?

Mr. Resner: Yes.

The Court: I do not think you will find any difficulty in entering into a stipulation as to anything else that took place, so far as the record is concerned.

Mr. Abel: You and I can go through the file and we can pick out the things we want.

Mr. Resner: Yes.

Mr. Abel: Might I also ask a stipulation that I may introduce whatever I wish from that file?

Mr. Resner: Yes, certainly, I have no objection.

Mr. Abel: I would like to point out I have one other witness here Mr. West said that there was a man operating as a liaison officer between Furness (Pacific) and the vessel, and I have brought him here in order that no inference might arise that he knew anything about the case, other than what Mr. West said. Now, I take it that you are willing to stipulate that he would so testify.

Mr. Resner: Yes.

The Court: The case will be continued until tomorrow morning.

(Thereupon an adjournment was taken until tomorrow, Saturday, March 22, 1947.) [38]

Saturday, March 22, 1947, 10:00 o'Clock A. M.

WALTER BELL

called as a witness on behalf of Plaintiff; sworn.

The Clerk: Will you state your name to the court?  
A. Walter Bell.

Direct Testimony

By Mr. Resner:

Q. Where do you live?

A. I live in El Cerrito.

Q. What is your occupation?

A. Vice president of the International Longshoremen and Warehousemen's Union, Local 10.

Q. Is that the Longshoremen's Local Union of San Francisco?  
A. Yes.

Q. How long have you been a longshoreman?

A. Twenty years.

Q. How long have you been an official of the union?

A. About six months this time. In 1941 and 1942 I was secretary-treasurer.

Q. Are you familiar with the contract in existence between your organization and the Waterfront Employers Association of the Pacific Coast?

A. Pretty familiar.

Mr. Resner: You have seen it, I take it.

Mr. Abel: Yes, I have seen it. I object to the introduction of it in evidence. [39]

Q. (By Mr. Resner): Let me show you the agreement, Mr. Bell and ask you if this is the agreement that has been in existence during the past few years.

(Testimony of Walter Bell.)

A. That is the agreement we have been working under until this new one which has not come out yet, which has not been printed.

Q. You have just negotiated and reached a new agreement within the last couple of weeks?

A. Yes.

Q But prior to that the agreement I hold in my hand was the agreement between the union and the Waterfront Employers Association? A. Yes.

Mr. Resner: I will offer it in evidence.

Mr. Abel: I object to it on the ground it is irrelevant to the issues.

The Court: Indicate for the record the purpose of the offer of this testimony?

Mr. Resner: The contract is between the union, on the one hand, and the Waterfront Employers on the other, of which Furness (Pacific) Limited, one of the defendants in this case, and the agent of Shaw, Savill & Albion is a member. The agreement provides that upon request the union shall provide longshoremen to work ship for these employers, and that the workmen shall work as directed, and in the event that the longshoremen object to conditions on the vessel which they claim [40] are unsafe, that they shall continue to work and the matter shall be referred to the port committee for determination. Now, I reason from that, your Honor, that an obligation is imposed on all longshoremen, including the plaintiff, Thomas, in this case, to work as directed for such people as the defendant in this case, Furness (Pacific) Limited, and if there is an obliga-



(Testimony of Walter Bell.)

tion imposed upon longshoremen to work as directed, as in this contract, and they refuse to work, it is considered a breach of the contract, and thereby technically a very heavy responsibility and obligation, particularly where they maintain conditions are unsafe, and it seems that when longshoremen have a foreign boat like the Fordsdale, of Shaw, Savill & Albion, which comes into our port and takes advantage of our longshoremen, our docks and facilities, that thereby they consent to the jurisdiction in cases of this kind, and should not be permitted to stand behind the technical rule that has apparently existed heretofore. That is the underlying theory and philosophy of the argument which I am making.

Mr. Abel: I have no doubt that Mr. Resner's argument would be very, very persuasive to legislators, but there is no showing on the record that this man is a member of this union, and it is rather abrupt to take judicial notice of the fact that the Waterfront Employers Association had this contract, and he assumes that this man, the plaintiff in this case, is in good standing in the union. My position is that this contract [41] does not purport to confer any right upon the members of the union in so far as a cause of action is concerned, and that if it did, there is no showing on this record that this man can take advantage of the terms of the contract.

Mr. Resner: I might say this, I had not expected counsel would raise the point that Mr. Thomas is not a member, and I told him not to

(Testimony of Walter Bell.)

come, because he has been working nights. He is a member of the union, there is no question about that, and I thought we could stipulate to that to obviate the necessity of bringing him in. He is a longshoreman, bound by this contract, Section 11 of which says, "The employer shall have the right to discharge any man for incompetence, insubordination, or failure to perform the work as required, in conformance with the provisions of this agreement. If any man feels that he has been unjustly discharged or dealt with his grievance shall be taken up as provided in section 10." Now, your Honor, that is what they have down there, is a Grievance Committee, and where a dispute occurs between the union member and the employer, the man's grievance is referred to the Grievance Committee for determination. That is correct, is it not, Mr. Bell?           A. Yes.

Mr. Resner. That being the case, and these stevedores who are working on the Fordsdale claiming the ship was unsafe, their only remedy would have been to take it up with the Grievance Committee. [42]

The Court: They would be compelled to work or there would be a breach of the contract. But that is a matter separate and apart from the issues presented in this case, which is the question of jurisdiction. Just one other remark. You should appear—and if there is a man that could do a better job I don't know of him—before a committee in Congress to support some legislation in that respect.

(Testimony of Walter Bell.)

Mr. Resner: Your Honor may be right, but I feel duty bound to make a record in this case, because of the unusual situation.

The Court: You make the best record you can.

Mr. Resner: I will offer it for identification.

The Court: Let it be admitted and marked for identification.

(The Agreement between International Longshoremen's and Warehousemen's Union and Waterfront Employers Association of the Pacific Coast was marked Plaintiff's Exhibit 10 for Identification.)

Mr. Resner: Will your Honor rule on the admissibility of it?

The Court: I will sustain counsel's objection to the admissibility of that testimony. Let the record so show.

Q. (By Mr. Resner): Mr. Bell, is Furness (Pacific) Limited a member of the Waterfront Employers Association?

A. I believe it is; I do not know that to be a fact, but I believe it is.

The Court: What was the testimony as to that which we had? [43]

Mr. Abel: It was that the Furness (Pacific) Limited is a member.

The Court: Who was it that testified to it?

Mr. Resner: W. West, of the Furness (Pacific) Limited stated they were a member of the Waterfront Employers Association.



(Testimony of Walter Bell.)

Q. And being a member of the Waterfront Employers Association Furness (Pacific) Limited would be a party to the contract which is here for identification? A. It would.

Q. Will you tell us how orders are placed for longshoremen?

A. Well, if Furness (Pacific) needed longshoremen they contact the Waterfront Employers Association, where all the orders for the day are filed, and the Waterfront Employers Association passes that on down to the hiring hall, to the chief dispatcher, as to the gangs each firm wanted orders filled for, in other words if they needed 50 gangs of men and only 30 were available the Waterfront Employers would decide who would get the gangs.

Mr. Abel: I would like to object to this entire line of testimony on the same grounds.

The Court: I will allow it subject to your objection and subject to a motion to strike. I want him to get the best possible record he can so that if there is any possibility of our Circuit Court doing otherwise I am willing to abide by [44] their decision. If I did otherwise under the state of the record as I anticipate it might be, I would be engaged in an idle act. Do you follow me?

Mr. Abel: Yes.

Q. (By Mr. Resner): A hiring hall is maintained jointly by the Union and the Waterfront Employers' Association? A. Yes.

Q. The men come down there and register for work on the piers, and when the orders come in they are dispatched according to the orders?

(Testimony of Walter Bell.)

A. That is correct, to this extent, that there are some men fill in on the gangs of the men there, so he knows how many gangs he has available.

Q. That is, there are extra men to fill out vacancies on the regular gang to make up the gang?

A. That is right.

Q. Do these longshoremen of yours work all foreign vessels that come into San Francisco Harbor?

A. That is right.

Q. Is there any other group of stevedores or longshoremen that work vessels, merchant ships in San Francisco harbor, other than members of your Union?      A. No.

Q. In other words, your Union, Local 10, furnishes all the stevedores for merchant ships in San Francisco Harbor? [45]      A. That is right.

Q. And surrounding waters?

A. Bay area.

Q. Does your organization also furnish longshoremen at all the ports on the Pacific Coast, other than the port of Tacoma?      A. That is right.

Q. A couple of small Oregon ports?

A. Tacoma and one of the small ports.

Q. At Seattle, San Pedro and San Diego they are under the same agreement?      A. Yes.

Q. When foreign ships come in here that are not members of the Waterfront Employers' Association, what is the situation there?

A. They generally work through the same agency, as far as the orders are concerned, they go to the Waterfront Employers' and come down to us.

(Testimony of Walter Bell.)

Q. Your orders come through a member of Waterfront Employers?

A. A member notifies headquarters and they in turn notify us, regardless of what ship it is.

Q. I want to show you, Mr. Bell, a list of the shipping members of the Waterfront Employers' Association of the Pacific Coast, a list of the associate members of the Waterfront Employers' Association of the Pacific Coast, a list of the shipping stevedore and terminal members of the Waterfront Employers of the Pacific Coast. Are you familiar with this list of employers and members? [46]

A. Well, I would say they are all members, and we work for them.

Mr. Resner: I would like to offer a list of the Waterfront Employers of the Pacific who are parties to the agreement in evidence.

The Court: Let it go in subject to the same objection.

Mr. Abel: I note the same objection as before for the record, your Honor.

The Court: Let the record so show.

(The list of Waterfront Employers of the Pacific who were parties to the agreement in evidence was marked Plaintiff's Exhibit 11.)

Q. (By Mr. Resner): Is it a fact, Mr. Bell, that when foreign ships come here that if the company itself is not actually a member of the Waterfront Employers' Association of the Pacific Coast that then such foreign ships or foreign companies



(Testimony of Walter Bell.)

obtain one of the members of the Waterfront Employers' Association to get the longshoremen to work the ship?

A. I believe that to be correct, because the stevedore company works a ship.

Q. You are familiar, are you, with the San Francisco Stevedore Company that Mr. Thomas worked for on the day in question? A. Yes.

Q. That is a company that works in San Francisco? A. Yes.

Q. That is a company for whom your men work every day? A. That is right. [47]

Q. Is that right? A. Yes.

Q. And when your men go aboard a ship to discharge or load cargo, are they required to work under the Union contract with the Waterfront Employers' Association? A. That is right.

Q. And do the men have any basis for refusing to work under that contract, Mr. Bell, or are they required to work?

A. No, there is no real basis for refusing to work; if it be unsafe or there are unsafe conditions they notify the grievance committee and they usually send someone down to pass judgment on it.

Q. Is it a frequent occurrence that foreign ships come in here to be worked which are not members of the Waterfront Employers Association or which do not have offices in this area?

A. That is correct.

Q. A great number of foreign ships come into San Francisco Harbor?

(Testimony of Walter Bell.)

A. There is quite a large number come in in normal times.

Q. Is it a fact that sometimes a ship comes in once and you never see it again?

A. That happens; a French ship may come in for a certain purpose and we never see it again.

Q. The usual custom is that that ship is worked through the agency of one of the members of the Waterfront Employers Association? [48]

A. Yes.

Q. And use your longshoremen? A. Yes.

Q. Would it also be the case that they would dock at one of the regular docks in San Francisco Harbor and use one of the State owned docks here?

A. Yes.

Q. Are all of the wharves and docks around this area State owned?

A. Well, on the San Francisco Waterfront they are, but in Oakland they are not.

Q. The San Francisco Waterfront is all State owned? A. Yes.

Q. And all the docks and piers are State owned?

A. That is my understanding.

Q. What about Oakland?

A. I understand those belong to the City.

Q. Are you referring now to the Howard Terminal and various docks—you mean they are owned by the State and some maybe privately owned?

A. I have always understood they were not State owned.

(Testimony of Walter Bell.)

Q. Over there the main docks are Howard Terminal and Encinal Terminal, are they?

A. They are the principal docks now.

Q. Do you know who owns those two? [49]

A. No, I don't.

Q. Has the Union in the past few months, in fact since the Longshoremen's strike of last summer, been endeavoring to work out with the Waterfront Employers' Association some basis for responsibility in case of accident on the part of these foreign ships?

A. There has been a general desire for safety and prevention of accidents along that line that we have endeavored to have them incorporate in the contract.

Q. There are a great many accidents on the waterfront? A. Yes.

Q. Has the Union made an effort with the employers to reach some basis for agreement with these foreign ships that come in here in case accidents happen, work up some basis for agreement so that they would be responsible?

Mr. Abel: I would like to object on the further ground that it is entirely outside of the scope of this case.

The Court: The objection will have to be sustained.

Mr. Resner: That is all.

The Court: Any questions?

Mr. Abel: No questions.



(Testimony of Walter Bell.)

At this point I would like to make a motion to strike all of the testimony of the witness on the ground that it is outside the scope of this case and entirely irrelevant under the pleadings. [50]

Mr. Resner: I do not think it should be stricken. I think it should remain for the value that it has to your Honor in ruling on the case.

The Court: I will not pass on it at this time. I will give you a full opportunity to be heard.

Mr. Abel: Then I submit the motion. That is all, Mr. Bell.

Mr. Resner: I only want to put in evidence certain records so that they can be marked for the record.

Mr. Abel: I have taken out the ones that you picked out yesterday and those are all in evidence. There are some others, if you want to stand here we will look at and I will put them in. I merely want to have them identified for the record.

Mr. Resner: I will do any way you want.

Mr. Abel: In the state of the record I do not think a ruling is necessary on the motion to quash.

The Court: Very well.

The Court: Is there anything else you have in mind?

Mr. Resner: I have some papers I want to put in. I would like to have a couple of minutes to go over these.

The Court: While you are doing that we will take a recess.

(After recess.)

(Testimony of Walter Bell.)

Mr. Resner: At this time, counsel and I have gone over certain exhibits from the file that the defendant produced here. I want to offer in evidence No. 12 to 30 inclusive on behalf [51] of the plaintiff.

The Court: They may be admitted and marked.

Mr. Abel: At this time I want to offer Defendants' Exhibit A to M inclusive, which are additional items from the file, and are intended to be generally descriptive of the conditions under which the Fordsdale operated on this coast.

The Court: Let them be admitted and marked.

(Thereupon the case was submitted on memorandum to be filed.)

### CERTIFICATE OF REPORTER

We, official Reporters and Official Reporters, pro tem, Certify that the foregoing transcript of 52 pages is a true and correct transcript of the matter therein contained as reported by us and thereupon reduced to typewriting, to the best of our knowledge.

/s/ EDWARD W. LEHNER. [52]

[Endorsed]: No. 11765. United States Circuit Court of Appeals for the Ninth Circuit. George Thomas, Appellant, vs. Furness (Pacific) Limited, a corporation and Shaw, Savill & Albion, Ltd., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 20, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit. [54]

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United States Circuit Court of Appeals for the  
Ninth Circuit

No. 11,765

GEORGE THOMAS,

Appellant,

vs.

FURNESS (PACIFIC) LIMITED, et al.,

Appellees.

STATEMENT OF POINTS ON WHICH AP-  
PELLANT INTENDS TO RELY ON AP-  
PEAL AND DESIGNATION OF THE REC-  
ORD ON APPEAL

Comes now appellant George Thomas, by his attorneys Messrs. Gladstein, Andersen, Resner & Sawyer and Herbert Resner, Esq., and files herewith his statement of the points upon which he intends to rely on the appeal herein, as follows:



1) The Order of May 2, 1947, of the District Court granting defendants' Motion for Summary Judgment, and the Order dismissing the complaint are contrary to law.

2) The Order of May 2, 1947, of the District Court granting defendants' Motion for Summary Judgment, and the Order dismissing the complaint are contrary to the evidence.

3) The Order of May 2, 1947, of the District Court granting the Motion of defendant Shaw, Savill & Albion, Ltd., to quash service of summons is contrary to law.

4) The Order of May 2, 1947, of the District Court granting the Motion of defendant Shaw, Savill & Albion, Ltd., to quash service of summons is contrary to the evidence.

5) The Order of May 2, 1947, of the District Court that the complaint herein be dismissed with prejudice is contrary to law.

6) The Order of May 2, 1947, of the District Court that the complaint herein be dismissed with prejudice is contrary to the evidence.

7) The District Court's finding and order that Shaw, Savill & Albion, Ltd., was not within the jurisdiction of said Court for the purposes of this suit is in error.

8) The finding and order of the District Court that Furness (Pacific) Limited was not a proper party defendant herein, and not a proper party to be served with process as agent for and representative of Shaw, Savill & Albion, Ltd., is in error.

9) In an action for maritime tort committed by a foreign corporation, or foreign vessel, within the territorial jurisdiction of the District Court, as in this case, such a foreign corporation or foreign vessel should be held to consent to service of process and jurisdiction for the purposes of such an action, and the agent or representative of such foreign corporation or foreign vessel which admittedly is within the jurisdiction of the Court shall be deemed to be a proper agent or representative for the purpose of service of process upon such a foreign corporation or foreign vessel in connection with such an action. The interests of justice and of law are served by such a holding.

Appellant designates the entire record in the court below, that is, the entire Clerk's Record and the entire Reporter's Transcript, as the record on appeal herein.

Dated: November 24, 1947.

GLADSTEIN, ANDERSEN,  
RESNER & SAWYER,  
/s/ HERBERT RESNER,  
Attorneys for Appellant.

[Endorsed]: Filed May 25, 1947.

[Acknowledgement of receipt of service.]

No. 11,765

IN THE  
United States Circuit Court of Appeals  
For the Ninth Circuit

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GEORGE THOMAS,

*Appellant,*

VS.

FURNESS (PACIFIC) LIMITED (a corporation), and SHAW, SAVILL & ALBION, LTD.,

*Appellees.*

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BRIEF FOR APPELLANT.

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GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
HERBERT RESNER,

240 Montgomery Street, San Francisco,

*Counsel for Appellant.*

FILED

MAY 6 1948

PAUL P. O'BRIEN,





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No. 11,765

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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GEORGE THOMAS,

*Appellant,*

VS.

FURNESS (PACIFIC) LIMITED (a corporation), and SHAW, SAVILL & ALBION, LTD.,

*Appellees.*

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**BRIEF FOR APPELLANT.**

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**I.**

**STATEMENT.**

This is an appeal by George Thomas, longshoreman, from an order of the District Court of the United States, Northern District of California, Southern Division, granting motion for summary judgment in favor of defendant-appellee Furness (Pacific) Limited (hereinafter referred to as Furness), and dismissing his complaint with prejudice as against said defendant-appellee, and also an appeal from an order granting a motion to quash service of summons as against defendant-appellee Shaw, Savill & Albion, Ltd. (hereinafter referred to as Shaw) and dismissing



with prejudice the complaint as against said defendant-appellee. (R. pp. 28-31.) The orders were made on May 2, 1947, and notice of appeal was filed on July 5, 1947. (R. 31.)

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## II.

### JURISDICTION.

(1) The District Court had jurisdiction pursuant to 28 USCA 41(1) (*Judicial Code* § 24 amended), the action being based upon diversity of citizenship and the amount in controversy exclusive of interests and costs exceeding \$3,000.

(2) The Circuit Court has jurisdiction to entertain this appeal pursuant to the provisions of 28 USCA 225 (§ 128 *Judicial Code*).

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## III.

### PLEADINGS.

George Thomas, longshoreman, filed his complaint for damages against Furness (Pacific) Limited in the Superior Court of the State of California in and for the City and County of San Francisco. (R. 2-7.) Thomas alleged that he was a longshoreman in the employ of the San Francisco Stevedoring Company and that on May 21, 1946, he was working aboard the British vessel SS Fordsdale, which was then docked at Encinal Terminals, Oakland, California. He was working at the No. 1 hatch as a winch driver. It was

night time and dark. He alleged that the winches at that hatch leaked oil and therefore were unseaworthy. He alleged that there were insufficient lights in the vicinity of No. 1 hatch, rendering the vessel unseaworthy. He alleged that both with regard to the winches and the absence of lights, and the fact that oil was permitted to accumulate on the deck where he was working from the faulty winches constituted negligence of defendant.

He alleged that he was caused to slip and fall because of the oil leaking from the winches and the fact that it was too dark to see where he was working, as the result of which fall he sustained severe injuries to his back and right hip, and other injuries for which he claimed damages in the amount of \$25,000.

He also claimed loss of wages due to his inability to work because of said injuries in the amount of \$800 at the time of filing his complaint, and also for damages on account of doctor and medical bills in an unspecified sum in order to treat his injuries.

Thereafter the action was removed to the District Court on motion of Furness. (R. 8.)

Thereupon Furness made a motion for summary judgment (R. 9) supported by the affidavit of James West, manager of Furness (R. 11). It was Furness' position in support of this motion, as shown by the affidavit of Mr. West, that it was only the agent for the Fordsdale and therefore was not liable to Thomas for his injuries.

Thereafter on motion of appellant Thomas, made pursuant to Rule 21 of the Federal Rules of Civil Procedure, Shaw, Savill & Albion, Ltd., owner of the vessel, was added as a party defendant. (R. 13-17.)

Thereafter appellant Thomas filed his first amended complaint for damages (R. 17-22), the only difference between the amended complaint and the original complaint being that in the new complaint Shaw was added as party defendant.

Thereafter Shaw made a special appearance and motion to quash service of summons upon it, said summons having been served on James West, general manager of Furness. (R. 23.)

In support of its motion to quash service of summons an affidavit was made by James West on behalf of Shaw (R. 25), stating that this company had its principal office in London, England, and did not have vessels calling regularly in California ports. Allegations were made with regard to the Fordsdale which will be referred to later.

A hearing was held on these motions before the Court below, wherein Mr. West was examined and certain testimony elicited and various documentary proofs received into evidence. Another witness, Walter Bell, Longshoremen's Union official, testified at this hearing. Thereafter the Court below made its orders in behalf of defendants noted above, and this appeal followed.



## IV.

**THE EVIDENCE.**

Mr. James West testified that he was Pacific Coast Manager of Furness, which company does not operate any of its own vessels but "acts as agents for any number of shipowners, any one of whom might appoint us to act on their behalf to load or discharge vessels". (R. 38.)

Furness is a Canadian corporation which operates agencies in San Francisco, Los Angeles and Vancouver (R. 38) but does business along the entire Pacific Coast. (R. 40.)

Furness has never designated an agent for service of civil process in California. (R. 39.) Furness is affiliated with Furness-Withy & Company, Limited, of New York and London (R. 40-41), and policy for Furness (Pacific) on the Pacific Coast is made by Furness-Withy of New York. (R. 41.) On some occasions Mr. West got instructions directly from his principals in London. (R. 41.)

On April 4, 1946, the Fordsdale entered San Francisco Harbor, at which time she was on time charter to the British Government Ministry of War Transport. (R. 42-43.)

On April 24, 1946, Furness took delivery of the Fordsdale for and on behalf of her owners, Shaw, appellee herein (R. 43.) Instructions to Furness to take over the Fordsdale came from Shaw. (R. 47.)

The Fordsdale was on the Pacific Coast from April 4, 1946, until May 26, 1946, when she departed Los Angeles for Great Britain with cargo. (R. 43.)

On April 25, 1946, the day after Furness took delivery of the vessels for her owners, Shaw, the vessel proceeded to Portland, Oregon, to load cargo, returning to San Francisco Harbor and mooring at Encinal Terminals on May 18, 1946. (R. 43.)

Cargo was loaded at Encinal Terminals between May 18 and May 22. (R. 43.)

We have noted that Mr. Thomas was injured on May 21, the day before the vessel departed San Francisco.

On May 24-25 the vessel loaded cargo at Los Angeles (R. 43) and then departed for Great Britain.

Furness made and carried through all arrangements for the handling of the Fordsdale on the Pacific Coast after accepting delivery of the vessel for the owners.

Counsel for defendants stipulated "we are willing to stipulate that Furness (Pacific) Limited made all of the arrangements for this vessel that were necessary on this coast. (R. 59.)

In this connection Furness obtained the certificates of seaworthiness for the Fordsdale (R. 48-49); arranged for repairs (R. 53-55); paid the repair bills on behalf of the owners (R. 55); arranged for and paid for the stevedoring of the ship (R. 55); made detailed instructions for the loading of the ship in collaboration with the ship's master (R. 57); arranged for her berthing and generally took care of

all of the business of the vessel while she was on the Pacific Coast. (R. 63.)

Mr. West testified that the responsibility of his company was "to take care of the ship and its cargo on behalf of the owners of the ship; when I say take care of the ship, I mean the repair of the ship, loading of cargo or the discharge of cargo, and everything attendant thereto". (R. 64.)

Mr. West testified "actually the ship was in our care and custody you might say from April 24 to May 26". (R. 64.)

Mr. West testified that Furness Withy & Company "communicated directly with Shaw, Savill & Albion in London to secure for its San Francisco office the agency for the Fordsdale while she was on the Pacific Coast". (R. 50.)

Much documentary evidence was introduced, as the record will show, indicating the very close connections between Furness (Pacific) and Furness Withy, and between these two concerns and Shaw, in connection with the matters which are the subject matter of this action.

Mr. West testified that his company was a member of the Waterfront Employers Association of the Pacific Coast. (R. 65.)

Mr. West testified that he communicated directly with Furness Withy, and Furness Withy communicated with Shaw concerning the accident to Mr. Thomas. (R. 61-62, 71.)



Walter Bell testified on behalf of appellant that he was an officer of the Longshoremen's Union, which had a contract with the Waterfront Employers Association, of which Furness (Pacific) was a member. (R. 74.)

Under this contract the longshoremen were compelled to work as directed all vessels for member companies, including all foreign vessels in San Francisco Harbor. (R. 78-79.) If any unsafe conditions exist aboard ship the longshoremen are to continue working until the matter can be adjusted through the grievance machinery provided by the contract (R. 81-82), unless the conditions are so hazardous that the longshoremen in good faith may refuse to work until the matter can be settled.

(See Agreement between International Longshoremen's & Warehousemen's Union and Waterfront Employers Association of the Pacific Coast, plaintiff's Exhibit 10 for identification, R. 77, Section 11.)

Mr. Bell testified that the longshore industry was very hazardous and that many accidents occurred. (R. 83.)

On many occasions foreign ships came into San Francisco Harbor and were never seen again. (R. 82.) The docks which these ships used are state owned on the San Francisco side of the bay and municipally owned on the Oakland side of the bay. (R. 82.)

## V.

**QUESTIONS FOR DECISION.**

(1) Under the facts and circumstances of this case, was Shaw, Savill & Albion, Ltd., a British ship-owner and owner of the Fordsdale, subject to the jurisdiction of the Court below for a maritime tort committed by that vessel while she was within the jurisdiction of the Court below so as to be subjected to that jurisdiction by service of ordinary civil process upon Furness (Pacific), its agent?

(2) Was service upon the General Manager of Furness (Pacific), agent for Shaw, good and sufficient service upon Shaw, and did such service subject Shaw to the jurisdiction of the Court below?

(3) Under the facts and circumstances of this case, was Furness suable for the maritime tort in question, and should that company, as agent for Shaw, be compelled to answer and defend on the merits?

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## VI.

**ASSIGNMENTS OF ERROR RELIED UPON.**

Appellant relies upon all of the errors which he assigns herein. (R. 86-88.)

Assignment of errors Nos. 3, 4, 5, 6, 7, and 9 are discussed under Point A following.

Assignment of errors Nos. 1, 2, 5, 6 and 8 are discussed under Point B following.

Assignment of errors Nos. 1, 2, 5, 6 and 8 are discussed under Point C following.

## VII.

**SUMMARY OF ARGUMENT.**

In this case we have Shaw, a British shipowner, bringing one of its vessels into California waters, and keeping her here for a period of several weeks. Altogether the vessel was on the Pacific Coast for a period of approximately a month and a half. While in California, and particularly while in San Francisco Bay, with which events we are particularly concerned here, the SS Fordsdale made use of California facilities, namely, docks, loading facilities, police and fire protection, customs, repair facilities, *and particularly stevedoring facilities.*

In connection with the use of these services, and particularly the use of the stevedoring facilities, a longshoreman, appellant Thomas herein, was injured. It is our contention that Shaw, by its conduct and by the use of the facilities noted, subjected itself to the jurisdiction of the Court below for torts committed by it locally in connection with the very services which it solicited locally, in this instance the stevedoring service. By this conduct we argue that Shaw subjected itself to being reached by ordinary civil process, service of which was made upon its General Manager in California, James West, Manager of Furness, the owner's agents. In other words, having solicited and used facilities in the San Francisco area, Shaw is liable for torts committed by it in the use of those facilities and has in effect thereby consented to be sued and be reached by ordinary civil process in connection with such maritime torts.



Furthermore, having designated Furness as its agent for all purposes, and the agent having performed a variety of services, in fact all that were necessary in connection with the handling of a ship on the Pacific Coast, Shaw has in effect agreed that service of ordinary civil process upon this agent shall be and constitute a good and valid service upon it so as to subject it to the jurisdiction of the Court below. Having received the benefits of our waters, docks, police and fire protection, repairs, *and long-shoremen*, the foreign shipowner has agreed to the burdens of being liable for torts committed by it while enjoying those benefits, and has in effect agreed to respond for such torts when its designated agent has been served.

More than this, the record discloses that Furness performed services of such a nature for the vessel that it, too, is liable for the vessel's maritime torts committed in this jurisdiction and therefore should answer and defend on the merits.

## VIII.

## ARGUMENT.

- A. A FOREIGN SHIPOWNER SUCH AS SHAW, UNDER THE FACTS DISCLOSED BY THE RECORD IN THIS CASE, IS SUBJECT TO THE JURISDICTION OF LOCAL COURTS FOR MARITIME TORTS COMMITTED BY ITS VESSELS WITHIN THAT JURISDICTION AND CAN BE REACHED BY THE SERVICE OF ORDINARY CIVIL PROCESS UPON ITS DESIGNATED AGENT.

Admittedly Shaw could be reached by a libel *in rem* against its vessel, or foreign attachment against its funds and property, if a claimant knew of the presence of such vessel or existence of such funds or property within the jurisdiction. This being so, can such a foreign shipowner escape jurisdiction from ordinary civil process when service is made upon its designated agent under the facts disclosed here?

It has been noted that this action was filed in the state Court originally, and removed upon motion of the defendants based upon diversity and a sum in excess of \$3,000 to the District Court. The removal brought the action to the law side of the Court.

Nevertheless, the cause sounds in maritime tort and therefore the maritime rules apply. As this Court stated in *Hall-Scott Motor Car Co. v. Universal Insurance Co.* (CCA 9), 122 Fed. (2d) 531, at page 534:

“\* \* \* The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court.”

Accord:

*Chelantis v. Luckenbach SS Co.*, 247 U.S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171;

*Union Fish Co. v. Erickson*, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261;

*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 159, 161, 40 S. Ct. 438, 64 L. Ed. 834, 11 A.L.R. 1145;

*Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259, 42 S. Ct. 475, 477, 66 L. Ed. 927;

*Puget Sound Navigation Co. v. Nelson*, 41 F. (2d) 536, 59 F. (2d) 697.

Most recently this rule has been announced by the Supreme Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099. The Court said (90 L. Ed. 1103):

“\* \* \* It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court.”

The rules which apply in maritime cases are enforced on the law side of the Court in the same way and with the same effect as though the action were brought in admiralty.

*Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 249, 63 S. Ct. 246, 87 L. Ed. 239;

*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 215, 37 S. Ct. 524, 61 L. Ed. 1086.

These rules are followed by the state Courts.

See:

*Intagliata v. Shipowners & Merchants, etc., Co.*,  
26 Cal. (2d) 365, 371,

where the Court said:



“It is now settled that the general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court, and *the state courts must preserve all substantial admiralty rights of the litigants. State courts having the same jurisdiction over a case that a federal court would have if the suit had been brought there must determine the rights of the parties under the maritime law as a ‘system of law coextensive with, and operating uniformly in, the whole country.’ ”* (Emphasis ours. )

It is our contention that jurisdiction would exist in admiralty as against Shaw under the facts disclosed by this record. Unquestionably we could reach Shaw by libel *in rem* or foreign attachment were any of her vessels or funds within the jurisdiction. This being so, why should a difference be made with regard to reaching Shaw by ordinary civil process on the law side?

Shaw’s argument whereby it would escape the jurisdiction of the Court below is based upon a claim of due process of law. The original notion that personal service must be obtained in an action *in personam* in order to support jurisdiction was based upon considerations of fairness. In other words, in order to subject a party to the Court’s jurisdiction it was thought that this person ought to be within the jurisdiction of the Court.

*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

Since *Pennoyer* however statutes providing for substituted service, whether by publication or other

means, have been held consistent with ideas of due process of law.

As the United States Supreme Court said in *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95, at 90 L. Ed. 102:

“\* \* \* due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ ”

Thus in our case there can be no question but that Shaw had complete knowledge of the injury to Thomas; West so advised them and had correspondence about the accident. (R. 61-62, 71.) Notice to Furness was certainly notice to Shaw. The record discloses the very closest relation between them in connection with the services to the Fordsdale. No unfairness attaches to subjecting Shaw to the jurisdiction of the Court in this case, where the purpose of such jurisdiction is to compel Shaw to respond for a tort committed within the jurisdiction, particularly where, as here, Shaw has full knowledge and can respond as easily here as anywhere else. This is more eloquently so from the standpoint of justice, because this is the only forum where plaintiff can reach Shaw.

Shaw argues that it is not present in California and was not present at the time of the tort, but presence in the legal sense has no mystical qualities and it



cannot be used as a shield to avoid an otherwise existing responsibility. As the Court said in the *International Shoe Co.* case, *supra*, 90 L. Ed. at 102:

“\* \* \* it is clear that unlike an individual its ‘presence’ without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far ‘present’ there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms ‘present’ or ‘presence’ are used merely to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.”

It is conceded in our case that Shaw carried on no business before the arrival of the *Fordsdale* and has carried on none since the departure of that vessel unless the winding up of the company’s business by Furness on August 10, 1946, be considered a continuance of business. But that is not important. The activities which Shaw carried on while the *Fordsdale* was here are sufficient to subject her to ordinary civil process and constitute sufficient “presence” for the purposes of this case. It must be remembered that we do not seek here to impose any tax liability or any long continuing obligations upon Shaw. There is sought to be imposed here responsibility only for the events which occurred when and arose out of Shaw’s bringing the *Fordsdale* into San Francisco waters.



A case practically identical to ours is *Oro Navigation Co. v. Superior Court*, 82 A.C.A. 1017 (hearing denied by the California Supreme Court on February 9, 1948). In the cited case a Greek shipowner had a vessel, the SS Telfair Stockton, in California waters only on the one occasion. Plaintiff seaman was injured in the service of the ship and brought suit against the company in the California Courts. The shipowner sought prohibition against the Superior Court, seeking to enjoin further proceedings in the case after Oro's motion to quash service of summons (comparable to Shaw's motion here) had been denied by the trial Court. The California Court held that Oro was present in California and subject to ordinary civil process because the tort which gave rise to the action occurred at a time when its vessel, the Telfair Stockton, was on the Pacific Coast and the company at that time was present in San Francisco. The case was one where Oro operated in San Francisco through its agents, General Steamship Company, a situation very comparable to ours where Shaw operated through Furness.

In the *Oro* case the California Court stated, 82 A.C.A. 1021:

“Service of process upon a corporation must be made at a place wherein the court which issued the process has obtained jurisdiction in a legal mode prescribed by the statutes of the place of service or by the provision of a United States statute. (*Doe v. Springfield Boiler & Mfg. Co.*, 104 F. 684 [44 C.C.A. 128].) Judicial decisions often express this rule by stating that the cor-

poration must 'be present' within the jurisdiction where service is made at the time of service. 'Presence' does not necessarily refer to the state wherein the articles of incorporation were filed, the location of the corporation's residence in directing the conduct of its business or the main site of operating activity. 'Presence' means transacting business which is not merely an isolated transaction. (*International Shoe Co. v. Washington*, 326 U. S. 310 [66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057].) *Likewise, the transaction should have a relation to the purpose for which the corporation was formed.* Whether the corporation is 'present' after a discontinuance of some former activity ordinarily presents a question of fact to be determined by established rules of law controlling within the jurisdiction where the foreign corporation was served. In this case the laws of California are applicable." (Our emphasis.)

In the *Oro* case the California Court construed former California Civil Code Sections 411, 406(a) and 405, providing for the means of obtaining service on foreign corporations. (These sections are now in the California Corporation Code.) Those statutory provisions are applicable and must be followed by the Court below in determining whether a good service was made upon Shaw by service upon Furness.

*Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817.

Thus in *Erie*, the Court said:

"\* \* \* the federal courts exercising jurisdiction in diversity of citizenship cases would apply as

their rules of decision the law of the state, unwritten as well as written.”

Thus this very circuit has construed California Civil Code, Section 411, in the same fashion as the section was construed in the *Oro* case.

*Premo Specialty Mfg. Co. v. Jersey-Creme Co.*,  
(C.C.A. 9), 200 F. 352.

Thus the Court stated in the *Oro* case, also pertinent here, at 82 A.C.A. 1025:

“A statute authorizing a means of service upon a sovereign corporation which has transacted business in a state and then departed, if the action arises out of such business and the process is served prior to the expiration of the statute of limitations, is valid. The basis of such decision is that persons who have transacted business should not be precluded from enforcing a corporate liability by the withdrawal of the corporation from the state.”

It may be argued that in the *Oro* case plaintiff Anderson was a seaman, while here appellant Thomas is a longshoreman. However, the rules are the same with regard to shipboard accidents. Thus in *Sieracki*, *supra*, the Court stated at 90 L. Ed. 1108:

“Running through all of these cases, therefore, to sustain the stevedore’s recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. *It is that for injuries incurred while working on board the ship in navigable waters*



*the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship."* (Our emphasis.)

It is therefore clear that Shaw would suffer a minimum of inconvenience by being subjected to jurisdiction in the Court below and that the interests of justice would be served by giving to the injured longshoreman Thomas a forum and his day in Court. Otherwise he is entirely bereft of remedy.

This is not like the case where it might be possible to reach a foreign corporation elsewhere in this country. It is not possible for appellant to reach Shaw abroad.

The argument could be offered that Shaw could not be compelled to respond to any judgment since it lacks funds in the jurisdiction, but is not the answer to that question to subject Furness to liability on behalf of Shaw? Furness, having accepted the benefits of Shaw's business certainly should be held accountable for Shaw's acts, and between themselves it is not unreasonable that Shaw and Furness will work out the question of financial responsibility should plaintiff prevail after a trial on the merits.

After all there would have been no purpose for the correspondence between Furness and Shaw on the question of Mr. Thomas's case had they not recognized the fact that financial responsibility would have to be worked out and indeed would have been worked out in the case had jurisdiction prevailed.

Particularly in maritime cases like this, where foreign shipowners are involved, it is our contention that the agent should be made equally responsible with the foreign owner and that service on the agent of ordinary civil process shall be considered valid service on the foreign owner. Dictates of justice and of sound maritime policy require this result. Otherwise, a longshoreman such as plaintiff, while serving the industry in which the foreign shipowner and his local agent benefit, would be left without remedy and protection or rights to which he is otherwise entitled. It is a very simple matter for the foreign shipowner and its agent to work out the question of responsibility.

As the Supreme Court said in *Sieracki*, 90 L. Ed. 1106:

“\* \* \* The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. \* \* \* Moreover, his ability to *distribute the loss over the industry* is not lessened

by the fact that the men who do the work are employed and furnished by another.”

There are many other cases which are helpful on the proposition that Shaw was sufficiently present in California to subject it to ordinary civil process by service on its agent Furness. Thus in *Hayward v. Matson Navigation Co.*, (DC ND Ill.) 1942 A.M.C. 705, holding that the Matson Navigation Company, a California corporation, could be sued in Illinois by service on its ticket agency in Chicago, the Court holding that the selling of tickets in Chicago was sufficient basis to determine the Matson Company as doing business in Illinois.

*Socony-Vacuum Oil Co. v. Superior Court of California*, (DC Cal.) 1939 A.M.C. 1500, 35 Cal. App. (2d) 92,

where it was held that occasional visits by Socony's vessels in California constituted doing business in the state, and where it was held that service upon an agent of the company here, although not specifically appointed by Socony for that purpose, constituted a good service.

There are a great number of cases holding that the admiralty court in its discretion will accept jurisdiction in cases involving foreign seamen and vessels, since other forums are not available to them. See for example:

“*The Prahovo*,” 1941 A.M.C. 694, (DC SD Cal.)



allowing jurisdiction in the case of Roumanian seamen's claim for wages as against a Roumanian vessel.

*Kriakos v. Polemis*, (DC SD NY), 53 F. Sup.

715, aff. (C.C.A. 2) 151 F. (2d) 132,

allowing jurisdiction of an action under the Jones Act by a Greek seaman in connection with injuries arising out of service aboard a Greek vessel as against her Greek owners. The Court speaking through District Judge Bright, said (p. 716):

“At the time of the assault, the ship had not left the territorial waters of the United States. Under the special circumstances existing, because of the war conditions and the probability that in no other place can this libellant obtain relief, if he is entitled to any, the motion is denied.”

See also:

*Carletto v. Italian Lines*, (N. Y. S. Ct.) 1942

A.M.C. 867;

*McGhee v. U. S.*, (C.C.A. 2) 154 F. (2d) 101;

*Brewer v. American President Lines*, (D. C.

S. D. N. Y.) 1941 A.M.C. 30,

holding that an American court may take jurisdiction of a group of ten libels against a Canadian ocean carrier in respect of cargo damage on non-American voyages, where it appears that seven of the libellants are American, and the convenience of witnesses would be no greater in Canada than here.

*Simpson v. Hamburg-American Line*, (DC

C.Z.) 1939 A.M.C. 1469,

where the plaintiff was a citizen of the Republic of Panama and the defendant was a German corpora-

tion, where the complaint was dismissed but where the Court said at page 1481:

“\* \* \* the courts of the United States will not take jurisdiction unless there are special circumstances, and such special circumstances are usually where the voyage has ended, or the seamen have been dismissed, or treated with great cruelty, etc., or where it would be an especial hardship upon the seamen if the court did not take jurisdiction.”

See also *Burr v. Pacific Tankers, Inc.*, 1947 A.M.C. 794, particularly at page 796 where the Court said:

“There is no question but that the defendant was engaged in interstate commerce, and, being a foreign corporation, could not be compelled to qualify to do business in the State of Oregon under the statutes of this state respecting foreign corporations; but this fact in and of itself does not prevent the defendant from being subject to the jurisdiction of the courts of this state. That fact would simply prevent the state from exacting a license or charging the defendant a fee to enable it to transact business within the state. Despite the fact that the principal business of the defendant is transportation, and interstate in character, if the defendant is within this state by its agents or officers and is doing business within the state, it is subject to the jurisdiction of the courts of the state. And the action here being of a transitory nature, it is immaterial where the cause of action arose or where the plaintiff may have his domicile.”

And again at page 797:

“Insofar as the issue now before this court is concerned, the court is of the opinion that the defendant actually has been and is actively engaged in doing business within this state.

“In 14-A *Corpus Juris*, at page 1381, is found the following statement:

“ ‘A foreign corporation is doing business in the state so as to be subject to the jurisdiction of the courts thereof when as a common carrier it is operating trains between points in the state or boats to and from a port in the state.’ ”

The Oregon court was considering substantially the same point we have here, namely, that while a foreign corporation could not be compelled to qualify to do business in the state, nonetheless it was *present within the state and liable to suit therein for events which occurred in connection with that presence and business in the state.*

The whole philosophy of the law is moving in the direction of subjecting to jurisdiction within a state those who do any kind of business within the state which results in the creation of legal liabilities. All of the statutes designed for substituted service on non-resident motorists are based on this philosophy.

*Hess v. Pawloski*, 274 U. S. 352, 71 L. Ed. 1091, 47 S. Ct. 632;

*Kane v. New Jersey*, 242 U. S. 160, 61 L. Ed. 222, 37 S. Ct. 30.

When we bear in mind all of the facts and circumstances here involved, and particularly that this is a



maritime case where the peculiar and special rules of admiralty apply and where it has always been the policy of the maritime courts to subject to jurisdiction those liable for wrongful acts, we conclude that the dictates of sound judicial discretion, as well as of sound maritime policy, require a finding that Shaw was present sufficiently to subject it to the jurisdiction of the Court below by the service of ordinary civil process upon its agent Furness.

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**B. SERVICE OF CIVIL PROCESS UPON AN AGENT OF SUFFICIENT DIGNITY TO GIVE ITS FOREIGN CORPORATION PRINCIPAL NOTICE OF THE EXISTENCE OF AN ACTION AGAINST THE PRINCIPAL IS SUFFICIENT TO BRING THE PRINCIPAL WITHIN THE JURISDICTION OF THE COURTS.**

The evidence as reviewed in this case shows the very close connections between Furness and Shaw; shows that Shaw had knowledge of everything that Furness did; that Shaw had knowledge of the very accident to Thomas. There can be no question of unfairness here because Shaw has had notice all along the way and Mr. West, as General Manager of Furness in California in effect was General Manager of Shaw for the business conducted by Shaw through the Fordsdale in California. The service upon Mr. West therefore was a good and sufficient service within the meaning of Rules 4(d)(3) and 4(d)(7) of the Federal Rules of Civil Procedure. Service was sufficient within the meaning of California Code of Civil Procedure Sections 411, 406(a) and 405.

The point made in the cases about service on an agent, where no officer of the corporation is present in the state, is that the agent must be of sufficient stature so that notice is likely to be given to the principal. We have seen that there can be no question about that in this case. The following cases support our contention that service upon Furness (Pacific) was service upon Shaw.

*Socony-Vacuum Oil Co. v. Superior Court*,  
supra, 35 Cal. App. (2d) 92, at 94,

where the Court said:

“Moore was an agent of the petitioner corporation, managing and controlling generally whatever services any of the ships of the petitioner corporation might require in loading or reloading. He was a general manager in California as distinguished from one in charge of a branch or department in a particular district, \* \* \* and his position with petitioner corporation was of sufficient character and rank to make it reasonably certain that the corporation would be apprised of the service of summons \* \* \*”

*Thew Shovel Co. v. Superior Court*, 35 Cal.  
App. (2d) 185;

*Milbank v. Standard Motor Construction Co.*,  
132 Cal. App. 67;

*Quinn v. Southgate Nelson Corp.*, (C.C.A. 2)  
121 F. (2d) 190.

And particularly important is *Premo Specialty Mfg. Co. v. Jersey-Creme Co.*, supra, construing and applying California Code of Civil Procedure § 411 and saying:

“The service of process upon an agent of a foreign corporation, who comes into the jurisdiction of the court upon the business of the corporation which is the subject of the suit in which service is made, appears to be above all other class of agents the one upon whom service should be made, *in order that notice may be promptly given to the corporation, and that it may be fully advised in the premises, and we see no reason why the foreign corporation doing business within the jurisdiction under such circumstances should not be bound by such a service.* (Our emphasis.)

*Connecticut Mutual Life Ins. Co. v. Spratley*,  
172 U. S. 602, 19 S. Ct. 308, 43 L. Ed. 569;

*St. Clair v. Cox*, 106 U. S. 350, 1 S. Ct. 354, 27  
L. Ed. 222;

*Henrietta Mining Co. v. Johnson*, 173 U. S.  
221, 19 S. Ct. 402, 43 L. Ed. 675.

So also as noted in the *Oro* case, *supra*, service of process upon a Mr. Reeves, Secretary of General Steamship Company, was held to be a good service upon the foreign corporation shipowner. The position held by Mr. West in our case is exactly comparable to that of Mr. Reeves in the *Oro* case; the relationship of Furness in our case is the same as that of General Steamship in the *Oro* case; and the relationship of Shaw is the same as that of *Oro* in the *Oro* case. It seems to us then that the ruling in the *Oro* case with regard to service of civil process is controlling in our case.



**C. FURNESS (PACIFIC) AS AN AGENT IS LIABLE  
FOR ITS OWN TORTS.**

Under any circumstances Furness cannot escape from the case, because the complaint (Paragraph V) alleges that the defendants “negligently and carelessly failed to safely and properly maintain the vessel, her winches, appurtenances, gear and lighting facilities” and that the defendants (which includes Furness) were guilty of the negligence which caused plaintiff’s injury.

Obviously, an agent is responsible for its own torts, and this is independent of any liability on the part of the principal. The liability of the agent presents a question of fact which can be determined only on a trial and not on any motion for summary judgment, or on a motion not concerned with the merits of the case.

That an agent is liable for its own torts in a case of this character and should defend on the merits has been held consistently by the United States Supreme Court.

*Brady v. Roosevelt SS Co.*, 317 U. S. 575, 87 L. Ed. 471, 63 S. Ct. 425,

where the Court said at p. 580:

“The liability of an agent for his own negligence has long been imbedded in the law.”

*Hust v. Moore-McCormack SS Co.*, 328 U. S. 707, 90 L. Ed. 1534, 66 S. Ct. 1218, 1946 A.M.C. 747;

*Quinn v. Southgate Nelson Corp.*, supra.

Under the circumstances revealed here Furness could be found to be responsible for the conditions which resulted in Thomas's accident. A very meager record shows it arranged for repairs of the ship, berthed the ship, arranged for loading the ship, and did many other things. In those connections Furness could be held liable for failing to have the place where the longshoremen worked in good condition, particularly when Furness was the concern which arranged for the employment of these longshoremen and therefore should be held accountable for providing for them a safe place to work.

*Cf. Seas Shipping Co. v. Sieracki, supra.*

Under any circumstances of the case Furness should not have been dismissed with prejudice and thereby escape liability which could be found against it after a hearing on the merits.

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### CONCLUSION.

We respectfully submit that the orders appealed from are in error and that the case should be reversed and remanded to the Court below, with instructions to compel appellees to answer and defend on the merits.

Dated, San Francisco,  
April 26, 1948.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
HERBERT RESNER,  
*Counsel for Appellant.*

No. 11,765

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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GEORGE THOMAS,

*Appellant,*

vs.

FURNESS (PACIFIC) LIMITED (a corporation), and SHAW, SAVILL & ALBION, LTD.,

*Appellees.*

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BRIEF FOR APPELLEES

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FILED

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PAUL P. O'BRIEN,  
CLERK

McCutchen, Thomas, Matthew,  
Griffiths & Greene,  
Farnham P. Griffiths,  
Charles E. Finney,  
Brent M. Abel,

1400 Balfour Building,  
351 California Street,  
San Francisco 4, California,

*Attorneys for Appellees.*





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United States  
Circuit Court of Appeals  
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GEORGE THOMAS,

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*Appellees.*

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BRIEF FOR APPELLEES

---

I.

**PLEADINGS AND FACTS ESTABLISHING JURISDICTION  
OF THE COURT BELOW AND OF THIS COURT**

Plaintiff, a longshoreman, filed his complaint in the state court alleging an injury suffered while working on board the SS Fordsdale on May 21, 1946 (R., pp. 3-4). The defendant named was Furness (Pacific) Limited (hereinafter referred to as "Furness"). Thereafter, on petition of Furness, a corporation of British Columbia, the case was removed (R., p. 8) to the district court on grounds of diversity, the necessary jurisdictional amount being in controversy. In the district court, Furness made a motion for summary judgment (R., p. 9) supported by



an affidavit of James West, its general manager (R., p. 11). The motion and supporting affidavit set forth that Furness was not the owner or owner *pro hac vice* of the Fordsdale and was not liable on any other ground for any injuries that plaintiff may have suffered. The motion prayed judgment in favor of Furness on the ground that there was no dispute as to any material fact as to liability of Furness, even assuming that plaintiff had in fact been injured. This motion was filed on September 13, 1946. (R., p. 10, p. 13). On December 10, 1946, plaintiff moved to add as a defendant the owner of the vessel, namely, Messrs. Shaw, Savill & Albion, Ltd. (hereinafter referred to as "Shaw") (R., p. 13). On March 3, 1947, the district court made its order granting the motion and ordering that summons issue (R., pp. 16-17). Plaintiff then purported to serve Shaw by leaving a copy of the summons and complaint with James West, General Manager of Furness, at the offices of Furness in San Francisco (R., p. 23). Defendant Shaw immediately filed a special appearance and a motion to quash service of summons (R., p. 23-4, p. 25). The special appearance and motion to quash were supported by a second affidavit of Mr. West (R., p. 25).

A hearing on the motions of both Furness and Shaw was held on March 21, 1947, at which Mr. West testified and was examined by counsel for all parties. (R., p. 37 and following).

At the conclusion of the testimony and after arguments of counsel, both motions were submitted. Thereafter the district court granted both the motion of Furness for summary judgment and the motion of Shaw to quash

(R., p. 30), the order being entered May 2, 1947 (R., p. 30). Plaintiff filed notice of appeal July 5, 1947 (R., p. 31).

On the foregoing facts, the District Court had jurisdiction pursuant to 28 U.S.C.A. Section 71 and 28 U.S.C.A. Section 41 (1) as amended (Judicial Code, Section 24, as amended). This court has jurisdiction pursuant to 28 U.S.C.A. Section 225(a) (Judicial Code, Section 128, as amended).

## II.

### SUMMARY OF ARGUMENT

Appellee Shaw contends that it was not, and could not be, properly served with summons by civil process in an action *in personam* in state or federal courts in California. Except where a foreign corporation consents to service, it must be doing business in the state where served to the extent necessary to justify the inference that it is present there if it is to be subject to service of such process. Shaw has never done business to this extent in California. Even if this is not so, Shaw had ceased to do business in California before it was joined and served and furthermore neither Mr. West nor Furness was in fact its agent at the time Shaw was joined and served.

As to Furness, there is no dispute as to any material fact regarding its relationship to the SS Fordsdale at the time of appellant's injury. This relationship was such as to establish that appellee Furness as a matter of law is not liable to appellant for his alleged injuries.

In the Argument following, headings A, B, and C present points supporting appellee Shaw. Heading D supports appellee Furness.

## III.

**ARGUMENT**

**A. Shaw has never done business in California to the extent necessary to subject it to jurisdiction in personam in State or Federal Courts in California. This is perfectly clear on the authorities and alone disposes of the appeal as to Shaw.**

Under Federal Rule of Civil Procedure 4(d)(3), service upon a foreign corporation shall be made

“by delivering a copy of the summons and of the complaint to *an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and*, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.” (Italics supplied)

Under Federal Rule of Civil Procedure 4(d)(7), service upon a foreign corporation is also sufficient if

“the summons and complaint are served in the manner prescribed by any statute of the United States or *in the manner prescribed by the law of the state in which the service is made* for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.” (Italics supplied)

The relevant California statute is section 6500 of the Corporations Code, formerly Section 406 of the Civil Code, providing as follows:

“Process directed to any foreign corporation may be served upon the corporation by delivering a copy to *the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice president, a secretary, an assistant secretary,*



*the general manager in this state, or the cashier or assistant cashier of a bank.*” (Italics supplied)

Service of process pursuant to this section is limited by Section 411 of the Code of Civil Procedure to corporations doing business in this state. These provisions must also be read in the light of constitutional limitations on the power of state or federal courts to render personal judgments against foreign corporations. It is well settled that a state or federal court may not, without violating respectively the due process clause of the 14th or 5th amendments, render a personal judgment against a foreign corporation which has not consented to service of summons upon it unless the corporation is *doing business*, as that phrase has been judicially defined, *within the state or within the jurisdiction of the federal court* at the time the service is made. The principle is succinctly stated in *People’s Tobacco Company v. American Tobacco Company*, 246 U.S. 79, 62 L. Ed. 587 (1918), quoted with approval in *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85, 77 L. Ed. 1047 (1933), where it is said, 246 U.S. at page 87:

“The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted.”

The following are the facts of record bearing on the question:

(a) Shaw is a corporation organized and existing under the laws of Great Britain (R., p. 25);

(b) Shaw does not now have, and never has had, offices or property in California (R., p. 25, p. 69), other than the Fordsdale herself;

(c) Shaw is not now, and never has been, qualified to do business in California (R., p. 25, p. 69);

(d) Shaw has not now, and never has had, employees who are residents of California (R., p. 27);

(e) Vessels owned by Shaw have never called at California ports, except for the visit of the Fordsdale in 1946 (R., p. 25, conceded in appellant's brief p. 16).

(f) After redelivery of the Fordsdale to her owners by the British Ministry of War Transport on April 24, 1946, the vessel was in California ports for a total of eight days, all on the same voyage. (R., p. 42, 43). She loaded during that period approximately 20 per cent of a full cargo (R., p. 68).

(g) The regular business of Shaw is operating steamships between the United Kingdom and ports of Australia and New Zealand (R., p. 69). The Fordsdale was not ordered to San Francisco by her owners but by the British Ministry of War Transport or the United States Navy (R., p. 65-66).

The question to be decided is not a close or difficult one under the authorities. Whatever the minimum character and quantum of business that must be done to subject a foreign corporation to jurisdiction *in personam*, it is clear that that minimum was not reached here. Shaw was not voluntarily entering into the regular business of carrying cargo to and from ports of California. In loading a cargo here, it was simply making the best of the situation in which it found itself when the Fordsdale was released from requisition in San Francisco.

Shaw could hardly be required to send the vessel home to England empty.

It is of course conceded that the absence of qualification by Shaw to do intrastate business in California does not establish its immunity to the jurisdiction of California courts, or of federal courts sitting in California.

See:

*Taylor v. Navigazione Libera Triestina*, 95 F. 2d 907 (C.C.A. 9, 1938)

But where, as here, a foreign corporation has not qualified and hence in effect consented to suit in the state by designating an agent to receive service of process, it must engage in a continuous or regular course of business in the state to be subject to suit *in personam*. Of the liability of a corporation foreign to Kentucky to suit in courts of that state, the Supreme Court said, in *International Harvester Co. v. Kentucky*, 234 U.S. 579, 583, 58 L. Ed. 1479, 1481 (1914):

“It has been frequently held by this court, and it can no longer be doubted, that it is essential to the rendition of a personal judgment that the corporation be ‘doing business’ within the state. *St. Louis Southwestern R. Co., v. Alexander*, 227 U.S. 218, 226, 57 L. Ed. 486, 488, 33 Sup. Ct. Rep. 245, and cases there cited. As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with, and that the corporation is actually doing business within the state.”

And in 234 U.S. at 585, 58 L. Ed. at 1482:

“In order to hold it responsible under the process of the state court, it must appear that it was carrying



on business within the state at the time of the attempted service. As we have said, we think it was. *Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction.*” (Italics supplied)

Something more than sporadic or isolated visits by Shaw vessels in California ports is required to confer jurisdiction in personam against Shaw.

There are numerous decisions dealing with the application of the general principle to the case of foreign corporate shipowners. In *Holliday v. Pacific Atlantic Steamship Corp.*, 354 Pa. 271, 47 A. 2d 254, 1946 A.M.C. 1048 (1946), the Supreme Court of Pennsylvania held that a Delaware corporation, four of whose ships visited Philadelphia in the course of one year, was not liable to suit *in personam* in Pennsylvania. It affirmed the trial court’s order setting aside service of process, which had been made upon R. A. Nicol & Company, an agent hired by the defendant to service its ships in Philadelphia. The case is quite similar on its facts to the one at bar. The court said, 47 A. 2d at 256, 1946 A.M.C. at 1050-1:

“From the beginning of 1944 until August 25th, when his evidence was given, the Nicol Company handled four ships operated by defendant but belonging to the War Shipping Administration. Mr. Nicol testified that his company was paid ‘agency fees on a ship basis.’ He stated that his company had ‘no contract’ with defendant. The understanding was ‘\* \* \* they would pay me so much in the way of fees per

ship.' His company rendered no services for the defendant except on the specified occasions.

\* \* \* \* \*

The work which the Nicol Company did for defendant from time to time as occasion presented itself was, in the words of defendant's counsel, 'turning a ship around' but there is not enough in the record to sustain in our courts a judgment *in personam* against the defendant foreign corporation: compare *Shambe v. Del. & H.R.R.R. Co.*, 288 Pa. 240, 135 A. 755."

There calls of four of defendant's vessels over an eight-month period were considered an insufficient quantum of business to support personal jurisdiction.

In *Mason v. Moore Line Ltd.*, 1928 A.M.C. 1768 (D.C. Ore., 1928, not reported elsewhere), a British shipowner was held not to be subject to suit *in personam* in Oregon even where the master of one of its vessels was served there. The complaint sought recovery for the death of a resident of Oregon on board one of defendant's vessels in the harbor of Portland. The defendant's vessels visited Oregon ports at irregular intervals as required by time and voyage charterers. The court relied largely upon *Moore Dry Goods Co., Inc. v. Commercial Industrial Co., Ltd.*, 282 F. 21 (C.C.A. 9, 1922), a decision of this court wherein the general rule requiring a continuous course of business to sustain jurisdiction was recognized.

See also:

*W. Bartholomew and Co. v. Rederi A/B Gefion*, 1946 A.M.C. 538 (Commissioner's report, S.D. N.Y., 1944, not elsewhere reported);

*Urlin v. W. R. Chamberlin Co.*, 1948 A.M.C. 84 (Superior Court, Wash., 1947, not elsewhere reported).

In the foregoing cases, the quantum and character of business done by the foreign corporation were below the minimum necessary to sustain jurisdiction *in personam*. In the cases which follow the minimum has been considered reached.

In *Socony Vacuum Oil Co. v. Superior Court*, 35 C.A. 2d 92, 94 P. 2d 1019, 1939 A.M.C. 1500 (D.C. of A., 1939) the opinion does not clearly set forth the extent of defendant's activities in California, but says (94 P. 2d at p. 1020):

*"From the statement of facts presented it appears that petitioner was transacting more than one isolated act of business in the state of California. Its business here was similar to the ordinary business transacted in its home port, New York, and was of sufficient substantial character to bring it within the purview of actively 'doing business in this state'. Code Civ. Proc. sec. 411; Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 P. 289; Davenport v. Superior Court, 183 Cal. 506, 191 P. 911; Milbank v. Standard Motor Construction Co., 132 Cal. App. 67, 22 P. 2d 271; Winfield v. United Fruit Co., 135 Cal. App. Supp. 791, 24 P. 2d 247."* (Italics supplied)

The court denied the shipowner's petition for a writ of prohibition restraining the trial court from entering a default in plaintiff seaman's personal injury action.

In *Jenkins v. Lykes Brothers S.S. Co.*, 48 F.S. 848 (E. D. Pa., 1943), a seaman sued his employer for damages for personal injuries. Lykes, the employer, moved to vacate service made upon Charles Kurz & Company, its agent in Pennsylvania. Lykes had no office and no employees in Pennsylvania. But thirty-five of its vessels had



called at Philadelphia over a two-year period. The court denied the motion to vacate service, saying, at page 849-50:

“The first contention of the defendant Lykes is that it is not doing business in Pennsylvania. It is conceded that if it is doing business, the fact that such business is purely interstate commerce does not render it immune to suit. *International Harvester Co. of America v. Commonwealth of Kentucky*, 234 U.S. 579, 34 S. Ct. 944, 58 L. Ed. 1479.

\* \* \* \* \*

Lykes is, qualitatively speaking, clearly doing business in Pennsylvania when it transports cargoes to and from Philadelphia, even though it maintains no offices here. *Quantitatively speaking, the fact that it has been so engaged for a period of over ten years and that during a recent two year period thirty-five of its ships have called at the Port of Philadelphia is sufficient to constitute doing business in Pennsylvania as distinguished from mere occasional or sporadic activities. Cf. Cafasso v. Philadelphia & R.R. Co., C.C., 169 F. 887; The Hanover, D.C., 6 F.2d 335; Marcum v. Owens-Parks Lumber Co., D.C., 31 F. Supp. 748.*”  
(Italics supplied)

In *Marcum v. Owens-Parks Lumber Co.*, 31 F.S. 748, 1941 A.M.C. 630 (W.D. Wash., 1940), a motion to quash service was denied where the defendant’s vessel called regularly at ports within the state. The court relied upon a decision of the Supreme Court of Washington, saying, 31 F. S. at 748:

“Under the statutes of Washington service may be had upon a foreign corporation by serving an agent if the corporation is doing business within the

state. Remington's Revised Statutes of Washington, Sec. 226, subsection 9.

Of the nature of the business to be transacted, the Supreme Court of Washington has said, in *Lucas v. Luckenbach Steamship Co.*, 1927, 141 Wash. 504, 508, 252 P. 526, 528:

'We have adopted the rule that, for a corporation to come within this statute, the business transacted by it must be a part of its usual or ordinary business, and must be continuous in the sense that it is distinguished from merely casual or occasional transactions. *Rich v. Chicago B. & Q. R. Co.*, 34 Wash. 14, 74 P. 1008; *State ex rel. Wells Lumber Co. v. Superior Court*, 113 Wash. 77, 193 P. 229, *State ex rel. Yakima Trust Co. v. Mills* [140 Wash. 357], 249 P. 8.

'That the appellant, in the visits of its steamships to Everett, was transacting its ordinary and usual business is beyond question. This question need not be further argued. No hard and fast rules can be laid down as to when a corporation transacts sufficient of its business to bring it within the statute. *Manifestly, if a ship calls at a port but once a year, it is transacting business there only casually or occasionally.* But, as its calls become more frequent, there must come a time when the court can say that it is doing business at that port within the contemplation of the statute.'''  
(Italics supplied)

*Oro Navigation Co. v. Superior Court*, 82 A.C.A. 1017, 187 P.2d 444 (D. C. of A., 1947),

relied upon heavily by appellant (pages 17, 18, 19, 28 of appellant's brief), is not in point. There the defendant had done business in California in the required sense

in the past, and the court only decided that, when served, the defendant had not effectively withdrawn from the state. In the very passage from the opinion quoted in appellant's opening brief (at page 18), the court recognized the principle for which we contend (187 P. 2d at 446):

“Service of process upon a corporation must be made at a place wherein the court which issued the process has obtained jurisdiction in a legal mode prescribed by the statutes of the place of service or by the provision of a United States statute. . . . Judicial decisions often express this rule by stating that the corporation must ‘be present’ within the jurisdiction where service is made at the time of service. . . . ‘*Presence*’ means *transacting business which is not an isolated transaction.*” (Italics supplied)

The foregoing cases are uniformly persuasive that *calls by a vessel on a single voyage at ports within a state are “casual”, “isolated” or “sporadic” transactions quantitatively below the minimum required for a finding that the shipowner is doing business in the jurisdiction.* Furthermore, the decisions of the Supreme Court on the more general question of what constitutes doing business require a finding that Shaw never has done business in California to the extent necessary to give the courts here jurisdiction in personam.

The Supreme Court case most nearly in point is *Rosenberg Brothers v. Curtis Brown Company*, 260 U.S. 516, 67 L. Ed. 372 (1922). There service was made in New York upon the president of an Oklahoma corporation which had no offices and no employees in New York



and was not qualified to do business there. Although the evidence was in dispute as to whether the president was in New York on the business of the corporation, the court decided the case on the premise that he was, holding even so that a motion to quash service had been properly granted by the district court. It said, 260 U.S. at 518, 67 L. Ed. at 375:

“The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the state. Compare *International Harvester Co. v. Kentucky*, 234 U.S. 579, 58 L. Ed. 1479, 34 Sup. Ct. Rep. 944; *People’s Tobacco Co. v. American Tobacco Co.* 246 U.S. 79, 62 L. Ed. 587, 38 Sup. Ct. Rep. 233, Ann. Cas. 1918C, 537. *And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial.* Compare *Chipman v. Thomas B. Jeffery Co.* 251 U.S. 373, 379, 64 L. Ed. 314, 316, 40 Sup. Ct. Rep. 172.”

This entire subject was carefully reviewed by Mr. Chief Justice Stone in *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945), cited at page 15 of appellant’s brief, wherein a foreign corporation was held to have sufficient “minimum contacts” with Washington to justify collection of an unemployment compensation tax by an action in personam in Washington state courts. There the salesmen of the foreign corporation had been engaged for several years in a

continuous course of soliciting business in Washington. Regarding the question of what "minimum contacts" are required, the court said in part (326 U.S. at 318, 90 L. Ed. at 103):

"Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 67 L. Ed. 372, 43 S. Ct. 170, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit, Cf. *Kane v. New Jersey*, 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30; *Hess v. Pawloski*, 274 U.S. 352, 71 L. Ed. 1091, 47 S. Ct. 641, *supra*; *Young v. Masci*, 289 U.S. 253, 77 L. Ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170, *supra*."

It is of course true that legislation may *under special circumstances* provide for some form of substituted service on a non-resident individual or corporation without violating due process, even where the normally required "minimum contacts" are not present. The use of automobiles creates such a danger to the general public that statutes providing for substituted service on non-resident owners, individual or corporate, have been uniformly upheld as a valid exercise of the police power of the states, and not violative of due process under the fourteenth amendment.

*Kane v. New Jersey*, 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30 (1916);

*Hess v. Pawloski*, 274 U.S. 352, 71 L. Ed. 1091, 47 S. Ct. 641 (1927);

*Young v. Masci*, 289 U.S. 253, 72 L. Ed. 1158, 53 S. Ct. 599 (1933).

So here, a statute of California, or a federal statute if confined to interstate or foreign commerce, providing for an approved form of substituted service on a non-resident shipowner might well be upheld, at least as not violative of due process, as to suits for personal injuries sustained by longshoremen on vessels in California waters. But in the state of the authorities discussed above, it would be an unjustified invasion of the legislative field for this court to hold that Shaw is liable to suit in California when it has never engaged in such a continuous course of business here as to establish the "minimum contacts" necessary to a finding of doing business.

Certain other contentions of appellant should be mentioned:

(1) Appellant says (brief, p. 12-13) that since he sues for a maritime tort the question of personal jurisdiction over Shaw is to be determined by the rules of maritime law. Our answer is that appellant is mistaken, but that, even if he is right, the rules applicable in an admiralty court are no different from the corresponding rules of law.

We agree that maritime rules of substantive law govern maritime causes of action, even in a law forum.

*Garrett v. Moore-McCormack Company, Inc.*, 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1937);  
*Intagliata v. Shipowners & Merchants, etc., Co.*, 26 C. (2d) 365, 159 P. (2d) 1 (1945)



But the power of an admiralty court to render a judgment in personam against a foreign corporation is no greater than that of the same court sitting at law. The requirements of due process as to a finding of corporate presence must be met regardless of forum and of the character of the cause of action.

If by his argument on this point appellant means that, assuming corporate presence within the jurisdiction, he may in a suit on the law side serve process in any manner proper in the same court sitting in admiralty, he might as well contend that the Supreme Court Admiralty Rules apply in the law court, so long as the cause of action is maritime. The suggestion is obviously unsound.

We conceive the correct rule to be that the uniformity required by the *Garrett* case, *supra*, extends to matters of substantive law only and that having chosen the law forum, appellant must comply with the Federal Rules of Civil Procedure as to matters procedural in character.

(2) Appellant says (brief, p. 15):

“No unfairness attaches to subjecting Shaw to the jurisdiction of the Court in this case, where the purpose of such jurisdiction is to compel Shaw to respond for a tort committed within the jurisdiction, particularly where, as here, Shaw has full knowledge and can respond as easily here as anywhere else.”

Under the proposition contended for, an individual or corporation would be held liable to suit in any jurisdiction where he or it commits a tort, and service within the jurisdiction would be unnecessary if the tortfeasor has actual notice of the suit. Any such view is repug-

nant to the fundamental requirement of personal service as a basis of jurisdiction recognized in *Pennoyer v. Neff*, 97 U.S. 714, 24 L. Ed. 565 (1878) and scrupulously followed since.

Furthermore, it is manifestly inaccurate to say that Shaw "can respond as easily here as anywhere else." Appellant blandly overlooks the fact that the crew of the vessel, who would alone have any knowledge of the alleged injury to appellant, are employees of Shaw (R., p. 66), a corporation of Great Britain (R., p. 25), and are not, and never have been, residents of California (R., p. 27). Shaw would have to bring witnesses from England.

(3) Appellant says (brief, p. 20):

"The argument could be offered that Shaw could not be compelled to respond to any judgment since it lacks funds in the jurisdiction, but is not the answer to that question to subject Furness to liability on behalf of Shaw? Furness, having accepted the benefits of Shaw's business certainly should be held accountable for Shaw's acts, and between themselves it is not unreasonable that Shaw and Furness will work out the question of financial responsibility should plaintiff prevail after a trial on the merits."

The suggestion would compel an agent to respond for all torts of its principal. To state the proposition is to refute its legal soundness. Even if plaintiff had a trial on the merits below, he would have to go to England to collect a judgment. And there, presumably, the judgment would be open to contest on the ground that it was rendered by a court having no jurisdiction. Ap-

pellant under such circumstances would be no closer to recovery than he is now.

On the authorities, then, it is clear that the calls of the Fordsdale in California ports in 1946 were an isolated transaction outside of the regular course of Shaw's business, and quantitatively below the minimum necessary to give the district court jurisdiction *in personam* over Shaw. As a matter of fairness, Shaw should not be subjected to suit in a jurisdiction where it cannot produce its witnesses. And to permit suit *in personam* against Shaw would be to compel the district court to perform an idle act, since appellant would still have to sue in England to collect a judgment.

**B. Even if Shaw did business in California to the necessary extent in May 1946, it had effectively withdrawn from California when it was joined in the present action in March 1947.**

The visit of the Fordsdale to California ports occurred in April and May 1946 (R., p. 42-43). Shaw was not joined as a party to the present action until March, 1947 (R., p. 16), almost a year later. Shaw's withdrawal from California had long since been complete.

In *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 47 L. Ed. 1113 (1903), service upon a foreign corporation was held properly set aside when made three and a half months after the corporation had ceased doing business in the state.

See also:

*Phillips Co. v. Superior Court*, 20 P.2d 717 (D. C. of A., Cal., 1933, not elsewhere reported).



While it is obvious that no moment can be arbitrarily fixed at which a corporation can be deemed to have withdrawn (absent a specific statute on the point), it seems clear that a corporation present in the state for about 8 days (the approximate period of the Fordsdale's visit while under the control of her owners, (R., p. 42, 43) has withdrawn when a reasonable period has elapsed thereafter. It is also plain that under these circumstances a reasonable period is something less than ten months.

Section 6504 of the Corporations Code has no bearing on this question, since it provides for service of process only upon corporations which have done *intrastate* business in California and thereafter withdrawn. There is nothing in the record to suggest that Shaw's business in California was other than foreign in character.

See:

*Texas Transportation, etc., Co. v. New Orleans*, 264 U.S. 150, 44 S. Ct. 242, 68 L. Ed. 611 (1924);  
*Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 58 S. Ct. 72, 82 L. Ed. 68 (1937).

For the same reason, *Oro Navigation Company v. Superior Court*, *supra*, has no application here, for there the court found (187 P. 2d at 447) that the shipowner's business had intrastate aspects.

**C. Even if Shaw did business in California to the necessary extent and had not withdrawn from California when joined in the present action, personal service was not properly made upon it.**

Under Federal Rule 4(d)(3), quoted *supra*, service upon a foreign corporation must be made upon an "officer," "a managing or general agent," or upon "any other agent

authorized by appointment or by law to receive service of process.” Under Section 6500 of the California Corporations Code, quoted *supra*, service upon such corporations must be made upon “the person designated as its agent for service of process or authorized to receive service of process,” or upon an “officer of the corporation,” or upon “the general manager in this state.”

It is apparent from the record that Mr. West, upon whom service was made, was not in fact within any of these definitions. He was “Pacific Coast Manager” of Furness (R., p. 37). He had no connection with Shaw whatever after the accounts with respect to the Fordsdale were wound up in August 1946, except to notify Shaw of this suit (R., p. 70).

In *Holland v. Parry Navigation Co.*, 1947 A.M.C. 1435, 7 F.R.D. 471 (E.D. Pa., 1947, not elsewhere reported), service on a foreign corporation was made by leaving the summons with an agent who acted for the defendant on a “ship to ship” basis, caring for defendant’s vessels at the port of Philadelphia under an informal arrangement similar to the one in the present case. When served, the agent was not engaged in servicing any of defendant’s vessels. Applying the Federal Rules and a statute of Pennsylvania similar to the California statute referred to above, the court quashed service on the ground that the person served was not acting as an agent when served. The court said (1947 A.M.C. at 1437-8):

“I think that on May 23, 1946, when service was made on Rice, there was no relationship of principal and agent in existence between Parry and Rice. As I have previously indicated, Rice performed duties for

Parry on a ship to ship basis. It seems to me that the nature of the authority conferred upon Rice by Parry can be viewed in either of two ways: First, that the authority was to exist for a specific time—namely, the duration of the vessel's stay in the Port of Philadelphia, plus any length of time prior to its arrival or subsequent to its departure during which business matters with respect to the vessel which Rice handled for Parry would normally have to be attended to; or, that the authority conferred on Rice was to perform a specified act or to accomplish a specified result—the expeditious “turning around” of Parry’s vessel. In either view of the nature of Rice’s authority, I think it is clear that since Rice had completed the transaction of its last previous item of business for Parry on May 12, 1946, the authority of Rice to act as Parry’s agent had terminated before May 23, 1946, when service was made on Rice. Restatement of Agency, secs. 105-106.”

See also:

*Moody v. Seas Shipping Co.*, 1947 A.M.C. 431 (D.C. W.D. Wash., 1947, not elsewhere reported).

In *Oro Navigation Company v. Superior Court*, *supra*, where service upon the shipowner’s agent was held to be sufficient, the holding was based partly on the fact that the shipowner, having represented (on the shipping articles which constituted plaintiff seaman’s contract of employment) that the corporation served was its agent, was estopped to deny that service on the agent was proper. See 187 P. 2d at page 446:

“Furthermore, it is through petitioner’s conduct in describing General Steamship Corporation, Ltd., as



‘Operating Mgrs.’ on the articles, that Anderson caused summons to be served upon General Steamship Corporation, Ltd. Code of Civil Procedure, Section 1962, subd. 3, provides: ‘Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission be permitted to falsify it’.”

Of course in the present case Shaw never made any representations of any kind to appellant.

It is clear that, when Shaw was joined in March, 1947, neither Mr. West nor Furness was within any of the classes of persons named in the rule as proper to receive service upon a foreign corporation.

**D. The motion for summary judgment in favor of Furness was properly granted.**

A vessel owner or owner *pro hac vice* owes a duty of care to longshoremen to provide a safe place to work, and, under recent decisions of the Supreme Court, is liable even without negligence for injuries to longshoremen caused by unseaworthiness.

*Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 L. Ed. 1099, 66 S. Ct. 872 (1946).

But Furness was obviously not an owner or an owner *pro hac vice* of the Fordsdale. Under an informal understanding not in writing, Furness undertook with Shaw, the owner, to *arrange for* provisions, fuel, berthing, loading of cargo and such repairs as the master might request while the vessel was in California ports. (R., p. 11-12). The crew of the vessel were employees of Shaw, the owner (R., p. 12).

Furness had no responsibility for navigation, upkeep or repair of the vessel (R. p. 13). Any repairs made in San Francisco were requested and approved by the master or chief engineer of the vessel, and Furness was not required or qualified to make any inspection. (R., p. 67). The chief officer of the vessel was in charge of stevedoring operations (R., p. 68). Under these facts, it is plain that Furness was at no time in possession or control of the vessel. The relation of Furness to the various vessels which it served is summed up by saying that Furness was "agent" for such vessels in California (R., p. 38). But it is plain from the record that if Furness had undertaken to make repairs to the Fordsdale without the master's permission, or to instruct the crew how to perform their duties, it would have been going beyond the scope of its employment and would have become a trespasser on the vessel. Under these circumstances, how can it be suggested that Furness is liable for defective conditions on board the vessel or for the negligence of the vessel's crew? Certainly an agent is not liable for the negligence of other agents of his principal.

In *Caldarola v. Eckert*, 67 S. Ct. 1569, 91 L. Ed. 1566 (1947), the Supreme Court held that even the War Shipping Administration's standard form of general agency agreement (see *Hust v. Moore-McCormack S.S. Co.*, 328 U.S. 708, 90 L. Ed. 1534, 66 S. Ct. 1218 (1946)) did not so identify the general agent with the vessel as to require a state court to impose liability upon it for injury to a longshoreman resulting from a defect of the ship's equipment. In the New York Court of Appeals (*Caldarola v. Moore-McCormack Lines, Inc.*, 295 N.Y. 463, 68 N.E. 2d. 444 (1946)), the court had said (68 N.E. 2d at 444):

“Defendants were not charterers of the vessel nor did they physically operate it. Plaintiff’s contention that defendants had a duty to him, to keep the ship in repair, was based on the terms of a ‘General Agency Contract’ made between defendants and the United States and covering this and other ships, plaintiff relying also on certain governmental ‘Regulations’ which supplemented and amplified that contract. By the contract and the regulations defendants were appointed agents ‘to manage and conduct the business of’ those ships. The Appellate Division held that nothing in the arrangements between defendants and the United States made defendants any more than managers of certain aspects of the ship’s ‘business’ and that defendants were not operators of the ship or responsible to third persons for its condition. \* \* \* The Appellate Division cited and applied *Cullings v. Goetz*, 256 N.Y. 287, at page 290, 176 N.E. 397, at page 398, where Chief Judge Cardozo wrote: ‘Liability in tort is an incident to occupation or control’.”

The Supreme Court said (67 S. Ct. at 1571):

“We agree that if, on a fair reading of the contract, the control which the Agents had over the vessel is the kind of control which New York requires as a basis of liability to third persons, the New York courts cannot so read the contract as to deny the right which New York recognizes. It is not claimed that an injured party has rights under the agency contract, or that it created duties to third persons. *Robins Dry Dock & Repair Co. v. Flint*, 276 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290. *And so the narrow question is whether the Agents were in possession and control of the Everagra.* This is the crucial issue, because liability in tort by the Agents for Caldarola’s injury would only arise in New York when there is such possession and control of



premises on which injury occurs, due to negligence in their maintenance. *Cullings v. Goetz*, 256 N. Y. 287, 176 N.E. 397.” (Italics supplied)

The Supreme Court thus squarely decided that under the general agency agreement the general agent was not in “possession and control” of the vessels which it was employed to service. Yet it is only necessary to examine the agreement to see that the general agent is far more closely concerned with the internal management of the vessel than is *Furness* here. While it would seem that the Supreme Court should, consistently with the *Garrett* case, *supra*, have decided the question of the general agent’s liability as one of maritime law (See Note, 35 Cal. L. Rev. 564, 567), it applied the law of New York, except in construing the agency contract.

The choice of law question thus raised was considered in *Vitozi v. Balboa Shipping Co., Inc.*, 163 F. 2d 286 (C.C.A. 1st, 1947), wherein the facts presented the converse of the case at bar. The owner, sued in personam at law by a stevedore seeking recovery for personal injuries, was granted a summary judgment when it showed that the vessel on which plaintiff was injured had been bareboat chartered to a third person, who thus became the owner *pro hac vice*. The court said (163 F. 2d at 289):

“Certainly if under federal law a demise charter party casts the duties and responsibilities of ownership upon the charterer, under federal law it must cast upon him the duty and responsibility to see to it that the vessel is seaworthy during the term of the charter, even though it may not have been seaworthy at the time when the charter party was entered into. On this reasoning two courts in cases in point have held the ship-

owner not liable. In *re New York Dock Co.*, 2 Cir., 61 F. 2d 777; *Muscelli v. Frederick Starr Contracting Co.*, 296 N.Y. 330, 73 N.E. 2d 536. We consider these cases correctly decided.

“If, however, we are in error in deciding the question of the defendant’s liability as one of federal law, and the decision of the Supreme Court in the *Caldarola* case, *supra*, requires that its duty to the plaintiff be determined by the law of New York, our decision nevertheless would be the same. The reason for this is that the New York Court of Appeals in the *Muscelli* case indicated that the result it there reached was required by the law of New York as well as by federal law, and furthermore, in the *Caldarola* case, [67 S. Ct. 1570] the Supreme Court said: ‘In any event, whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises’.”

Under this approach, the judgment below must be affirmed if, as a matter of both maritime and California law, *Furness* is not liable to appellant herein. As to both, the law is clear.

Under the maritime law, no demise of the vessel occurs unless her possession and control is transferred to another, whether charterer or some other bailee.

The *indicia* of such a demise are described in *Reed v. U.S.*, 78 U.S. 591, 20 L. Ed. 220 (1870), where it is said, 20 L. Ed. at page 220:

“Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract [assumed], and assume in

fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. *Donahue v. Kettel*, 1 Cliff., 137; *The Volunteer*, 1 Sumn. 551; *Drinkwater v. The Spartan*, 1 Ware. 153; *Gracie v. Palmer*, 8 Wheat., 605; *Clarkson v. Edes*, 4 Cow., 470; *Taggard v. Loring*, 16 Mass., 336; *Christie v. Lewis*, 2 Brod. & B., 410.”

Unless there is a demise, so that a charterer becomes an owner *pro hac vice*, the charterer is not liable to third persons for the defective condition of the ship or for negligence of her crew. This principle was applied in *The Edgar H. Vance*, 284 F. 56 (C.C.A. 9, 1922), cert. den. 260 U.S. 750, 43 S. Ct. 250, 67 L. Ed. 495 (1923), where the charterer of a tug was held not liable to the tow for negligence of the tugmaster. The same result was reached in *The Spokane*, 294 F. 242 (C.C.A. 2, 1923), cert. den. 264 U.S. 583, 44 S. Ct. 332, 68 L. Ed. 861 (1924), wherein an employee of a repair contractor sought to recover for personal injuries received on board a vessel when he slipped and fell because of the greasy condition of the deck. The owner of the vessel had remained in possession, and the time charterer was held not liable. The Court said (294 F. at 245):

“We do not think the charterer can be held liable, for the reason that it was obligated to furnish the appellee a reasonably safe place to work as argued, for the relation of master and servant did not exist be-



tween them. *The charterer is not liable for failure to clean the deck or remove the oil and grease. It did not have common possession or control of the navigation or operation of the vessel. There was no demise or letting of the vessel itself.* The charter vested in the charterer no possession or custody of the steamer, with the rights or obligations incident to a demise of possession.” (Italics supplied)

It is apparent from the record that the connection of Furness with the Fordsdale was not even as close as that of a time charterer. Certainly it could not under any circumstances be deemed an owner *pro hac vice*. The only connection of Furness with the vessel was in arranging the shore-side facilities necessary for her accommodation in California ports.

As to the California law, no state court cases have been found dealing with the liability of persons other than the actual owner for personal injuries occurring on board a vessel.

As to the liability of an owner, see:

*Peterson v. Klitgaard*, 212 Cal. 516, 299 Pac. 54 (1931).

The well established rules governing liability to third persons as between the owner and possessor of real property furnish a convincing analogy, however. The California cases uniformly support the general proposition that liability is an incident of, and attaches to, control of the particular condition which causes the injury. The lessee in possession is alone liable for injuries caused by a condition arising after his possession commences.

*Rider v. Clark*, 132 Cal. 382, 64 Pac. 564 (1901);  
*Oles v. Kahn Bros.*, 81 Cal. App. 76, 253 Pac. 158  
 (1927);  
*Mundt v. Nowlin*, 44 C.A. (2d) 414, 112 P. 2d. 782  
 (1941).

See:

Restatement of Torts, Sections 355, 387.

Furthermore, it is clear under the *Intagliata* case, *supra*, that under California law, the general maritime law governs maritime causes of action, regardless of forum.

Under both state and maritime law, then, liability to third persons for injuries occurring on board a vessel should, and must, rest only on the party having actual possession and control of the vessel.

Appellant says in his opening brief (page 24):

“That an agent is liable for its own torts in a case of this character and should defend on the merits has been held consistently by the United States Supreme Court.”

We agree, of course, that an agent is liable for its own torts. And admittedly the complaint alleges “negligence” of “the defendants,” which presumably includes Furness.

But appellant apparently contends that a defendant may never have summary judgment if the complaint alleges his negligence. It is submitted that appellant misapprehends the purpose and effect of Federal Rule of Civil Procedure 56, dealing with summary judgments, which provides in part as follows:

“(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move

with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. \* \* \* The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, *there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*” (Italics supplied)

In order to recover against Furness, appellant must prove a relationship establishing legal responsibility in Furness for his injury. *Appellant has already had his day in court to establish such a relationship.* By clear and uncontroverted testimony, Furness has shown that it was not in possession or control of the Fordsdale. It follows as a matter of law, whether it be the maritime law or the law of California, that it is not liable to appellant for any injury he may have received on the vessel because of its defective condition or of the negligence of the vessel’s crew. Appellant has had ample opportunity to raise issues “as to any material fact” affecting Furness’ liability and has not done so.

The propriety of a summary judgment in this type of case was considered in *Vitozi v. Balboa Shipping Co., Inc.*, *supra*. In the opinion of the District Court, 69 F. Supp. 286 (D.C. Mass., 1946), it is said at page 289:

“Thus it appears on the facts of this case about which there is no genuine dispute that the plaintiff cannot recover in this action against the defendant, whatever other remedies he may have against his employer, the United Fruit Company.” [United Fruit Company was the demise charterer.]



The Circuit Court agreed that there was no issue as to any material fact.

There being no issue as to any material fact establishing that Furness was not the owner *pro hac vice* of the Fordsdale, and had no legal responsibility for its condition, there can be no question that Furness' motion for summary judgment was properly granted.

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### CONCLUSION

Against his employer, San Francisco Stevedoring Company, appellant has an ample remedy under the Longshoremen's and Harborworkers' Compensation Act (33 U.S.C.A. Section 901 et seq.). That he has no effective remedy against the vessel is no more unfortunate than in any other case where an aggrieved party cannot obtain local jurisdiction over an adversary.

The court is respectfully requested to affirm the judgment of the court below in all respects.

Dated, San Francisco, June 4, 1948.

McCUTCHEEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE,  
FARNHAM P. GRIFFITHS,  
CHARLES E. FINNEY,  
BRENT M. ABEL,  
*Attorneys for Appellees.*

No. 11766

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

*ser. vol. 2502*

BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,  
PACIFIC COAST BORAX COMPANY, a  
corporation, UNITED STATES BORAX  
COMPANY, a corporation, and AMERICAN  
POTASH & CHEMICAL CORPORATION,

Appellees.

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Transcript of Record

IN TWO VOLUMES

VOLUME I

Pages 1 to 450

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

JAN 28 1948

PAUL P. O'BRIEN, CLERK





No. 11766

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United States  
Circuit Court of Appeals

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VS.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

STERLING CARR,

1 Montgomery Street, San Francisco, California.

Attorney for Plaintiff and Appellant.

MAURICE E. HARRISON,

MOSES LASKY,

BROBECK, PHLEGER & HARRISON,

111 Sutter Street, San Francisco, California.

PAUL SANDMEYER,

NEWLIN, HOLLEY, SANDMEYER &

COLEMAN,

1020 Edison Building, Los Angeles, California.

Attorneys for Pacific Coast Borax Com-  
pany, Borax Consolidated, Ltd., and

United States Borax Company,

Defendants and Appellees.

OLIVER & DONNALLY,

110 E. 42nd Street,

New York, N. Y.

WILLIAM J. FROELICH,

Continental Illinois Bank Building,

Chicago, Illinois.

CHARLES A. BEARDSLEY,

1516 Central Bank Building,

Oakland, California.

PHILIP M. AITKEN,

402 Woodmen Accident Building,

Lincoln, Nebraska.

Attorneys for American Potash and Chem-  
ical Corporation,

Defendant and Appellee.



In the District Court of the United States for the  
Northern District of California, Southern  
Division

No. 24948-G

BURNHAM CHEMICAL COMPANY,  
a corporation,

Plaintiff.

vs.

BORAX CONSOLIDATED, LTD.; PACIFIC  
COAST BORAX COMPANY; UNITED  
STATES BORAX COMPANY; STERLING  
BORAX COMPANY; SAN BERNARDINO  
BORAX MINING COMPANY; AMERICAN  
POTASH & CHEMICAL CORPORATION;  
ONE TWO COMPANY; THREE FOUR  
COMPANY; FIVE SIX COMPANY;  
SEVEN EIGHT COMPANY; JOHN DOE;  
RICHARD ROE; TOM NINE; and JOHN  
TEN,

Defendants.

### COMPLAINT

To the Honorable, the Judges of the District Court  
of the United States for the Northern District  
of California, Southern Division:

Plaintiff above named complains against defend-  
ants above named and for cause of action alleges:

#### Jurisdiction and Venue

1. This complaint is filed and these proceedings  
are instituted under an act of Congress of July 2,  
1890, as amended, [1\*] entitled "An Act to Protect

---

\* Page numbering appearing at foot of page of original certified  
Transcript of Record.

Trade and Areas against Unlawful Restraints and Monopolies (15 U.S.C. Sec. 15)”, said act being commonly known and hereinafter referred to as the Sherman Act, against the above named defendants in order to recover damages suffered by plaintiff as herein set forth by reason of the action and things performed, done and carried out by defendants herein named or in violation of said Sherman Act and pursuant to Section 15 of said Act.

2. The alleged unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to monopolize, and contracts, combinations, and conspiracies to restrain trade and commerce among the several States of the United States and among foreign nations, have been, and are, conceived, carried out, and made effective in part within the Northern District of California, Southern Division, and many of the unlawful acts done pursuant thereto have been performed by the defendants, or some of them, and their respective representatives within said District within the three years next preceding the date of the filing of this Complaint. Certain of said defendants have usual places of business in the said district and there transact business, and are within the jurisdiction of the Court for the purpose of service. The interstate and foreign trade and commerce involved in the borax industry, as hereinafter described, is carried on in part within said District and Division.

## Description of Plaintiff

3. That plaintiff above named is now, and at all times herein set forth, has been, a corporation organized and existing under and by virtue of the laws of the State of Nevada.

## Description of Defendants

4. Borax Consolidated, Ltd., is a corporation organized and existing under the laws of the United Kingdom, with offices [2] and principal place of business at Danes Hill, Oxshott Surrey, England. It owns and operates borate deposits, boracite mines, refineries, railways, factories, and other operating buildings located in the United States, England, France, Austria, Turkey and South America, including the properties of its subsidiaries and affiliates, among which are the Pacific Coast Borax Company and the United States Borax Company hereinafter made defendants.

5. Pacific Coast Borax Company is a corporation organized and existing under the laws of the State of Nevada, with offices and principal place of business in Los Angeles, California; said defendant also maintains an office, agent and place of business in the City and County of San Francisco, State of California. Said defendant is successor to the corporation of the same name incorporated under the laws of the State of New York, but disincorporated in 1937. Defendant Pacific Coast Borax Company mines and operates borate deposits located in Kern County, California, and operates a borax refinery



located in Wilmington, California. The policies, management and activities of the defendant Pacific Coast Borax Company are controlled and directed by the defendant Borax Consolidated, Ltd.

6. United States Borax Company is a corporation organized and existing under the laws of the State of West Virginia, with offices and principal place of business in Los Angeles, California. Defendant United States Borax Company was organized by the defendant Borax Consolidated, Ltd., solely for the purpose of holding title to borate deposits. The policies, management and activities of the defendant United States Borax Company are controlled and directed by the defendant Borax Consolidated, Ltd.

7. American Potash & Chemical Corporation is a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business in New York, New York. Said defendant owns part of and leases from the United States [3] Department of the Interior most of the remaining part of Searles Lake located in the Mojave Desert in San Bernardino County, California, from which it extracts borax and potash. It also owns and operates a borax refinery at Trona, California. On October 20, 1942, approximately 90% of the shares of stock of the American Potash & Chemical Corporation were vested in the Alien Property Custodian after investigation had disclosed that said stocks was beneficially owned by citizens of the German Reich.

8. Sterling Borax Company is a corporation organized and existing under and by virtue of the laws of the State of Nevada. That subsequent to the purchase of the mine of said Sterling Borax Company by Defendant Pacific Coast Borax Company in 1916, as hereinafter set forth, said Pacific Coast Borax Company became the owner and holder of all the outstanding issued bonds of said Sterling Borax Company, and thereafter become, and ever since has been and now is, the dominating force and control of said Sterling Borax Company.

9. San Bernardino Borax Mining Company is a corporation organized and existing under the laws of the State of Nevada, and is now and has been at all times herein stated a subsidiary of and under the control and domination of said Pacific Coast Borax Company.

10. That the other defendants named herein are named by fictitious names as the true and correct names of said defendants are to plaintiff at this time unknown, and that plaintiff prays that when the true names of said defendants, or any of them, are discovered, such true names may be set forth in the place and stead of said fictitious name or names. That Defendants One Two, Three Four and Five Six are, and each of them is, a corporation organized under and by virtue of the laws of various states, the exact ones of which being to plaintiff, at this time, unknown; that Defendant Seven Eight Company is a co-partnership. [4]

11. Each of the defendants has participated in, and now participates in, the direction and management of various parts of said conspiracy and combination and has authorized, ordered or done some or all of the acts constituting offenses hereinafter set forth: acts alleged in this complaint to have been done by a defendant corporation where authorized, ordered or performed by officers, directors, agents or employees of such defendant corporation, including those persons named herein as defendants. Certain of said defendants, as hereinafter more particularly set forth, have formed a part of said conspiracy and combination since the commencement of the acts and combinations herein set forth and others of said defendants have, from time to time, the exact days of which are to plaintiff at this time unknown, entered into and become a member of said conspiracy and combination.

#### Definition of Terms

12. "Borax," as used herein, shall be deemed to mean a white crystalline material, soluble in water, slightly alkaline, the formula of which, disregarding the water of crystallization, is  $\text{Na}_2\text{B}_4\text{O}_7$ . The ordinary commercial form of borax has ten units or equivalents of water of crystallization.

13. The terms "dehydrated borax" or "anhydrous borax," as used herein, shall be deemed to mean borax from which all the water of crystallization has been expelled.

14. "Boric acid," as used herein, means borax treated with a suitable acid, usually sulphuric acid,



which results in the product the chemical formula of which is  $\text{H}_3\text{BO}_3$ .

15. The term "crude borates," as used herein, shall be deemed to mean unprocessed ores or minerals from which borax or boric acid is derived. The four principal types of crude borates are kernite, tincal, colemanite, and ulexite.

16. "Kernite," as used herein, means a natural borate. Kernite is the purest of the borate ores. It is a sodium borate. [5]

17. The term "tincal," as used herein, means a natural borate ore. Like Kernite, it is a sodium borate.

18. The term "colemanite," as used herein, means a calcium borate ore. Transformation of colemanite to commercial borax requires a chemical injection of a sodium product.

19. The term "ulexite" as used herein signifies a soft, silky fibrous borate mineral. Ulexite is a mixture of calcium and sodium borates.

20. "Lake brine," as used herein, means water of dry lake beds strongly impregnated with salt or other saline substances from which borax may be extracted.

21. The term "refined borax," as used herein, means borax resulting from the processing of any crude borate as above defined, or from the extraction and processing of any lake brines.

22. The term "distributor," as used herein, means one who purchases borax or boric acid from a producer for resale to ultimate consumers.

## Nature of Trade and Areas Involved

## (a) The Commodity

23. Borax is obtained by refining certain crude borates, and by extraction from lake brines. Boric acid is made from crude borates or borax by treatment with a suitable acid, usually sulphuric acid. Borax is available in several forms, namely crystal or lump borax, coarse granular borax, fine granular borax, powdered borax, and impalpable borax. There is also an anhydrous or dehydrated form of borax, which is borax from which all of the water of crystallization has been expelled.

24. The chief source of borax is crude borates. Approximately 95 per cent of the world's deposits, active and inactive, of commercially valuable crude borates are located in the State of California and the southwest section of the State of Nevada; all of the world's deposits of kernite are located in [6] Kern County, California. Although there are approximately sixty known crude borates in the world, only four contain sufficient boron oxide content to warrant commercial exploitation. These are kernite (sometimes known as rasorite, but hereinafter referred to exclusively as kernite), tincal, colemanite, and ulexite. The commercial value of borate ores is largely determined by the boron oxide content, which averages 50 per cent in the best crude ore, which is kernite. Colemanite is a calcium borate, tincal and kernite are sodium borates. Ulexite is a mixture of calcium and sodium borate. Kernite, the most important of the borate ores, is found only in

the United States, and all of the known United States deposits of kernite, except 10 acres herein-after referred to, are now owned by the defendant Borax Consolidated, Ltd., through itself or its subsidiary, the defendant United States Borax Company.

25. The other source of borax is lake brine, more than 99 per cent of which is extracted from Searles Lake, located in the Mojave Desert in San Bernardino County, California, by a process of evaporation and fractional crystallization. Approximately one ton of borax is obtained as a co-product of two tons of muriate of potash. This process produces no crude borate. The remaining approximately 1 per cent is produced from Owens Lake, Inyo County, California.

#### (b) Uses

26. Borax and boric acid have more than two hundred uses. The properties of borax to which its principal uses are related are its strong fluxing ability, that is, its power to promote the fusion of metals or minerals, its mild antiseptic properties, and its mild alkaline properties which make it useful as a buffering agent to neutralize acids or bases without changing their original acidity or alkalinity. Borax and boric acid have been and are strategic chemicals in the war production program of the United [7] States and its Allies, and will be important chemicals in the nation's reconversion program to civilian production. They are important ingredients (in excess of 25 per cent) in the manufacture



of enamels for coating metalware such as bathtubs, sinks, plumbing fixtures, etc. In the manufacture of glass, borax and boric acid acts as fluxes to promote the distribution of the other constituents of the glass. This fluxing quality makes possible the production of glass containing a high percentage of silica and alumina. Borax is particularly useful in the manufacture of heat-resisting glass used in kitchenware, lamp chimneys, and signal lenses. Large quantities of borax and boric acid are used in the production of glazes for tiles, earthenware and china; in the manufacture of adhesives for neutralizing dextrene or casein; in the manufacture of starches, detergents, sizing compounds and metallurgical fluxes. Borax and boric acid are among the best successful fluxes because they restrict the formation of metallic oxides and exert a solvent action on such oxides as are formed. Boric acid is used in the melting of alloys of copper and nickel, and in their recovery from scrap. The flux is used to prevent oxidation and to collect and eliminate foreign matters. Borax is used in aviation instrument panels and in the manufacture of explosives, particularly magnesium bombs; in the manufacture of rubber as an anticoagulant; in the manufacture of optical glasses, airplane and balloon fabrics, and certain distillate motor fuels. It is used in the manufacture of boron carbide crucibles. As an abrasive, boron carbide ( $B_4C$ ) is second in hardness only to the diamond, and is also an economical source of boron in metallurgical processes, both as a source of boron for alloys and as a powerful

deoxidizing agent. In the leather industry borax is used for soaking, cleaning and neutralizing solutions, and in the textile industry as a buffer in dye-baths and for the degumming of silks. Borax is used in agriculture in the washing of citrus [8] fruits to prevent decay and as a fertilizer. It is used to prevent cracked stems in celery, to prevent heart rot in beets, and to retard the growth of weeds. Borax and boric acid are widely used in pharmaceutical preparations and cosmetics because of their mild antiseptic and detergent properties. They are used in the production of medicated lint, gauze, hair preparations, shampoo powders, permanent wave specialties, talcum and dust powders, tooth powders, skin creams, and other cosmetics, and as constituents of ointments, insect powders, and other preparations. Boric acid is also an ingredient of hypochlorite antiseptic solutions. In the manufacture of coated, glazed, or enameled paper, borax is employed as a solvent for casein since it is a mild alkali and yet capable of giving complete solution at low temperatures. Recent experiments indicate an increased use of borax in the manufacture of borosilicate glass for electric insulation, fluorescent lighting, glass fabrics, glass building blocks, and glass wool for insulation of buildings.

### Development of the Industry

27. There are four distinct periods in the history of the production of borax in the United States: first, the period of lake borax, from 1864 to 1872; second, the period of marsh borax, from 1873 to

1887; third, the period of colemanite, from 1887 to 1926; and fourth, the period of kernite and the Searles Lake production, from 1927 to the date of this Complaint.

### (1) Lake Borax

28. From 1864 to 1872, commercial production of borax centered mainly in the various California lakes, namely, the Tuscan Springs, Tehama County, California; Pitt River, in Shasta County, California; Borax Lake, on the southeast edge of Clear Lake, California; and Lake Hatchinhama, on the south side of Clear Lake, California. All of these locations contained tincal or natural borax, dissolved in the lake or spring water, or [9] crystallized in the mud at the bottom or sides of the lake. Production from the lake period of the industry came to a sudden close in 1872 with the discovery of so-called marsh borax in Nevada and California. Production of borax from lakes was discontinued since it was more economical to produce it from alkaline marshes.

### (2) Marsh Borax

29. From 1873 to 1887, borax was taken from alkaline marshes located in Nevada and California. These marshes contained little or no water. The borax was lodged in surface incrustations produced by the evaporation of saline waters in these undrained reservoirs. The characteristic ore of the marshes was unrefined. The Nevada marshes were located in the northwest part of Esmeralda County



and the southwest corner of Mineral County, east of Yosemite National Park. Production in California during this period, beginning in 1873, was centered in San Bernardino County. Lack of adequate transportation facilities in this area retarded development of the industry. It was necessary to use mule teams made up usually of twenty mules specially selected. The wagons drawn by the mules had a capacity of twelve tons each. Each team pulled two wagons and a tank holding 1200 gallons of water, a total load of 70,000 pounds. It was a ten-day trip through barren desert land to the railroad at Mojave, California.

30. The processing of marsh borax was more economical than the evaporation of lake waters and a greater quantity was produced. In 1873 production increased to 1,000 tons annually, and in 1887 it reached a maximum of 5,500 tons. Colemanite was discovered in 1882 at Death Valley, California. Between that year and 1887, colemanite began to compete with marsh borax. New deposits of colemanite were discovered in the Calico Mountain District, near Daggett, California. In 1887, most of the marshes were abandoned, and from 1887 until 1919 colemanite became the sole source of production of borax in the United States and the principal source from 1919 to 1927.

### (3) Colemanite

31. The colemanite phase of the borax industry (1887-1926) was distinguished from the two preceding phases by an abundance of the ore. Crude borate

was produced and sold, as well as refined borax and boric acid. Transportation had ceased to be difficult since the most important of the colemanite mines were located near the junction of the Santa Fe and Union Pacific Railroads at Daggett, California. Beginning in 1922, a substantial amount of borax was produced from the brine of Searles Lake, located in the Mojave Desert in San Bernardino County, California. Throughout this period there was a constant increase in production. In 1926, approximately 92,000 tons of borax were produced from the colemanite mines and approximately 20,000 tons from the brine of Searles Lake.

#### (4) Kernite and Searles Lake Production

32. In August of 1925, a new borate mineral called kernite was discovered in Kern County, California. In 1927, there was a sharp rise in the production of borax at Searles Lake. These two developments revolutionized the borax industry. Borax production from colemanite ceased entirely. Kernite displaced colemanite as the principal borate ore because production costs were cheaper, the mines were more easily accessible to transportation facilities, and it was superior in quality, massiveness, and purity, and was more easily mined. Due to its peculiar composition, kernite has six fewer equivalents of water than borax, and gains weight in the refining process. In recrystallization, kernite absorbs the six units of water, and hence a ton of kernite ore yields approximately 1.39 tons of borax.

## Control of Industry

33. For some years prior to 1929, the exact date of [11] which to plaintiff at this time being unknown, and ever since said date, the world trade in borax and borax products has been and now is completely dominated and controlled by defendants Borax Consolidated, Ltd., and the American Potash & Chemical Corporation and their subsidiaries, all in violation of and contrary to said Sherman Act, and the amendments thereto. The former controlled during said times, and now controls, 95 per cent of the world production of borax from crude borates, including 100 per cent of the world production from kernite, all of which is located in Kern County, California; the latter controls approximately 90 per cent of the world production of borax derived from lake brines, 99 per cent of which comes from Searles Lake located in the Mojave Desert, San Bernardino County, California.

## Control of Crude Borates

34. Control of crude borates by defendant Borax Consolidated, Ltd., has been achieved through acquisitions of borate deposits and mines. In 1899, this Company was registered in Great Britain "to acquire the borate and colemanite deposits, boracite mines, railways, factories, etc., in the United States, England, France, Austria, Turkey, and South America of various companies, including Borax Co., Ltd., Pacific Borax and Redwoods Chemical Works, Ltd., Soc. Lyonnaise des mines et lesines De Borax". In the same year it purchased defendant Pacific Coast Borax Company.



35. During the period 1899-1923, defendant Borax Consolidated, Ltd., exercised almost complete control of the borax and boric acid industry. Its subsidiary, defendant Pacific Coast Borax Company, produced approximately 85 per cent of the world supply of crude borates during the period 1899-1906. The remaining 15 per cent was produced by Western Mineral Company from a mine located in Inyo County, California, by Stauffer Chemical Company from low-grade colemanite claims in Ventura County, California, through its control of the Frazier Borate Mining Co., by [12] the American Borax Company which operated a mine at Daggett, San Bernardino County, California, by the Columbus Borax Co. operating mines in Ventura and San Bernardino Counties in California, and by the Palm Borates Co. operating a colemanite mine in San Bernardino County, California. In 1907, defendant Pacific Coast Borax Company, as an incident to opening a colemanite mine at Ryan, Inyo County, California, in the Death Valley region, reduced the price of borax from \$136 to \$100 per ton, with the result, according to the information and belief of plaintiff, that the following competitors were eliminated: Western Mineral Co., American Borax Company, Columbus Borax Co., Palm Borates Co., and the Frazier Borate Mining Company.

36. That plaintiff is further advised and believes, and therefore alleges, that in 1906 the Russell Borate Mining Company of Los Angeles, California, was formed to mine colemanite from depos-

its in Ventura County, California; that this company did not produce until 1912; that in 1913 it ceased operations and was purchased jointly by defendant Pacific Coast Borax Company and the Stauffer Chemical Company.

37. That plaintiff is further advised and believes, and therefore alleges, that in 1908 the Sterling Borax Company of Los Angeles, California, was organized and began production from a colemanite mine located at Lang, Los Angeles County, California; that this mine was purchased by defendant Pacific Coast Borax Company in 1916 and closed.

38. That plaintiff is further advised and believes, and therefore alleges, that in 1913 colemanite was discovered in the so-called Kramer District, Kern County, California, by Doctor John K. Suckow; that these deposits were purchased immediately by defendant Pacific Coast Borax Company, and that by 1916 defendant Pacific Coast Borax Company was the only producer of crude borates in the United States. [13]

39. That plaintiff is further advised and believes, and therefore alleges, that in 1920, new colemanite deposits discovered at White Basin, Clark County, Nevada, were purchased promptly by defendant Pacific Coast Borax Company.

40. That plaintiff is further advised and believes, and therefore alleges, that in 1921 the American Borax Company was organized under the laws of

the State of Nevada for the purpose of producing crude borates from colemanite claims located in that year at White Basin, Clark County, Nevada; that in 1924 this company began production; that in 1925 the Stauffer Chemical Company acquired a controlling interest in the American Borax Company; that the discovery of kernite caused a discontinuance of mining at White Basin; that in 1937 the defendant Borax Consolidated, Ltd., through its subsidiary Pacific Coast Borax Company, purchased the colemanite claims formerly belonging to the American Borax Company, destroyed the underground mining facilities, and closed down the mine.

41. That plaintiff is further advised and believes, and therefore alleges, that in 1920 the West End Chemical Company, of Oakland, California, was formed for the purpose of producing chemicals, principally soda ash, alkali, common salts, and borax; that this company purchased a colemanite mine in the White Basin Area, Clark County, Nevada, in 1921, and began production of borax in 1923, producing until the discovery of kernite in 1926, after which the mine was closed; that defendant Borax Consolidated, Ltd., attempted to purchase these deposits in 1921, but the attempts was defeated when the agent dispatched to purchase the property failed to contact the discoverer before representatives of the West End Chemical Company.

42. That plaintiff is further advised and believes, and therefore alleges, that in 1924 Dr. John K. Suckow discovered additional colemanite in the



Kramer District in Kern County, California [14] and formed the Suckow Chemical Company of Los Angeles, California, to exploit the claim; that the stock in the Suckow Chemical Company was owned 40 per cent by defendant Pacific Coast Borax Company, 25 per cent by Dr. Suckow, and 35 per cent by the Stauffer Chemical Company; that the right to vote the stock of the Stauffer Chemical Company was vested in Dr. Suckow, which gave him control; that Dr. Suckow mined on his deposits in 1924, but in 1925, defendant Pacific Coast Borax Company paid Dr. Suckow \$150,000 for his 25 per cent interest and his voting right in the Stauffer stock, and promptly closed down the mine and dismantled the refinery.

43. That plaintiff is further advised and believes, and therefore alleges, that in 1927 defendant Pacific Coast Borax Company abandoned its colemanite works located in the Death Valley region of southeastern California due to discovery and opening by it of kernite mines located in Kern County, California.

44. That plaintiff is further advised and believes, and therefore alleges, that in 1928 the Western Borax Company of Los Angeles, California, was organized for the purpose of operating kernite mines located near the Kramer District, Kern County, California; that these mines were purchased by defendant Borax Consolidated, Ltd., through its subsidiary, the defendant United States Borax Company, in 1933.

45. That plaintiff is further advised and believes, and therefore alleges, that in 1929 the Suckow Borax Mines Consolidated of Los Angeles, California, was organized to exploit sodium borate (tincal) deposits located in Kern County, California; that these properties were acquired by lease by defendant Borax Consolidated, Ltd., in 1934, and thereafter were operated by defendant Pacific Coast Borax Company; that in December of 1942 the properties were purchased by the defendant United States Borax Company; that with this acquisition, defendant Borax Consolidated, Ltd., and its subsidiaries [15] achieved a complete monopolization of the world's known sodium borate deposits.

46. That plaintiff is further advised and believes, and therefore alleges, that although the discovery of kernite caused a shutdown of the colemanite mines, Borax Consolidated, Ltd., on May 27, 1935, purchased the colemanite mine of the Death Valley Borax Company, which was about to start production, for the sum of \$137,000 and promptly closed the mine.

### Control of Lake Brine Borax

47. That plaintiff is further advised and believes, and therefore alleges, that in 1912 the American Trona Company (predecessor of defendant American Potash & Chemical Corporation) was organized for the purpose of extracting borax and potash from the brine of Searles Lake, located in the Mojava Desert, San Bernardino County, California;

that a part of the lake was leased from the United States Department of Interior and a part purchased in fee; that production of borax began in 1919, and reached substantial proportions by 1925, when approximately 18,000 tons of borax were produced.

48. That plaintiff is further advised and believes, and therefore alleges, that in 1926 the American Trona Company was reorganized and became the American Potash & Chemical Corporation; that the entire plant at Searles Lake was rebuilt and with the installation of a new refining unit at Trona, California, in 1927, production of borax at Searles Lake was increased by 108 per cent over 1926; that in 1931, a \$4,000,000 expansion program increased the plant capacity of defendant American Potash & Chemical Corporation by 50 per cent; that by 1937, defendant American Potash & Chemical Corporation was producing approximately 100,000 tons of borax annually, or approximately 30 per cent of the United States total for that year; that it controls, either by lease or by ownership in fee, approximately 85 per cent of the workable area [16] of Searles Lake from which approximately 99 per cent of the world's supply of borax produced from lake brines is obtained.

49. That plaintiff is further advised and believes, and therefore alleges, that in 1930 the Pacific Alkali Company of Los Angeles, California, which had been organized in 1928 to produce soda ash and alkali, began producing borax from Owens Lake, located in Inyo County, California, which it owns;



that the borax production of this company has been negligible, ranging from 400 tons to 2,000 tons annually; that prior to World War II, most of its borax production was sold in export markets; that this company is now producing a small tonnage of borax.

50. That plaintiff is further advised and believes, and therefore alleges, that beginning in 1922, and continuing to date, the West End Chemical Company has leased approximately 15 per cent of the workable area of Searles Lake from the United States Department of Interior for the purpose of extracting alkali, common salts, and borax from the lake brine; that production of borax has been sporadic; that a total of approximately 15,000 tons was produced in its peak year of 1939; that the West End Chemical Company sells its entire output of borax through the Stauffer Chemical Company.

51. That plaintiff is further advised and believes, and therefore alleges, that the Stauffer Chemical Company, of San Francisco, California, was organized in 1895 for the purpose of producing and refining chemicals, particularly sulphuric acid, carbon disulfide, sulphur, cream of tartar, and whiting; that because it produced sulphuric acid, the Stauffer Chemical Company from 1895 to 1925 manufactured boric acid solely for the account of the Pacific Coast Borax Company from borates shipped to Stauffer Chemical Company by Pacific Coast Borax Company for that specific purpose; that it entered the borax industry on its own account in 1901 by securing control of the Frazier Borate Min-

ing Company described [17] heretofore in paragraph 35; that Stauffer Chemical Company refined the crude borates and distributed the refined products. When the Frazier Borate Mining Company ceased operations in 1906, Stauffer Chemical Company purchased an interest in the Sterling Borax Company, described heretofore in paragraph 37; that this source of crude borates lasted until 1915, when the Sterling Borax Company was purchased by defendant Pacific Coast Borax Company; that during the period 1915-1922, the Stauffer Chemical Company had no source of crude borates for producing borax or boric acid for its own account. From 1922 to 1927 it was supplied by West End Chemical Company; and, from 1928 to 1933, by the Western Borax Company; that when the latter company was purchased by defendant Pacific Coast Borax Company in 1933, defendant Pacific Coast Borax Company, as part of the purchase agreement, agreed to supply Stauffer Chemical Company with crude borates for manufacture into boric acid until 1941; that since 1941 the Stauffer Chemical Company has executed successive two-year contracts with defendant Pacific Coast Borax Company for its supply of crude borates to be used solely for the manufacture of boric acid; that since 1933, Stauffer Chemical Company has also purchased all of the borax production of the West End Chemical Company.

52. That plaintiff is further advised and believes, and therefore alleges, that by 1934 and continuing down to the date of the filing of this Complaint

defendant Borax Consolidated, Ltd., and defendant Pacific Coast Borax Company owned and controlled approximately 99 per cent of the world's crude borate deposits and 95 per cent of the world's production of borax from borate minerals, including all of the world's kernite deposits, less 10 acres thereof hereinafter referred to as the "Little Placer", and 100 per cent of production from kernite; that defendant American Potash & Chemical Corporation controlled approximately 90 per cent of the world's production of borax derived from lake brine; that most [18] of the remaining 10 per cent of the borax derived from lake brine is produced by Pacific Alkali Company and West End Chemical Company; that the supply of the latter company is purchased by Stauffer Chemical Company.

53. That plaintiff is further advised and believes, and therefore alleges, that in 1943 approximately 300,000 tons of borax were produced; that of this amount approximately 200,000 tons were produced from the kernite mines in Kern County, California, and approximately 100,000 tons were produced from lake brines, 99 per cent of which was derived from Searles Lake; that until the outbreak of the European War in September 1939, the combined exports of borates from the United States, both crude and refined borax, and boric acid, made by defendants, amounted approximately to 75 per cent of the domestic production; that the principal export markets prior to the War were Great Britain, Germany, France, Belgium, and Japan; that approxi-



mately 60 per cent of the exports from the United States to these countries consisted of crude borates. Prior to September 1939, defendants exported crude borates, refined borax and boric acid from the United States to more than forty foreign countries.

### Method of Sale

54. Defendant Pacific Coast Borax Company mines crude borates at mines located in Kern County, California, and ships to its refinery located at Wilmington, California; and to refineries of the defendant Borax Consolidated, Ltd., located at London, England; Dunquerque, France; Port Dundas, Glasgow, Scotland; Barcelona, Spain; and Standlau, Austria, where it is refined to produce borax and boric acid. Defendant Pacific Coast Borax Company is also the selling agent in the United States and Cuba for defendant Borax Consolidated, Ltd., and ships the refined products from the refinery at Wilmington, California, to industrial users in various States of the United States and to industrial users in [19] Cuba, pursuant to contracts of sale. The ore refined at refineries located in London, England; Dunquerque, France; Port Dundas, Glasgow, Scotland; Barcelona, Spain; and Standlau, Austria, is shipped to industrial users in various other foreign countries by defendant Borax Consolidated, Ltd., pursuant to contracts of sale made with such industrial users. Defendants Pacific Coast Borax Company and Borax Consolidated, Ltd., also sell crude borates directly to foreign and domestic industrial users, pursuant to

contracts of sale. Both companies also sell crude borates, refined borax and boric acid to distributors located in the United States and in foreign countries which in turn resell to users.

55. Defendant American Potash & Chemical Corporation extracts borax from the brine of Searles Lake, refines it at its refinery located at Trona, California, near the Lake, and sells and ships it to industrial users located in the various States of the United States, pursuant to contracts of sale. Its selling agent in the United Kingdom and Europe is defendant Borax & Chemicals, Ltd., of London, England. Its selling agent in the Orient, except for China, is Imperial Chemical Industries of London, England, and its Canadian selling agent is the St. Lawrence Chemical Company, Ltd., of Montreal, Canada. All of these selling agencies also sell refined borax and boric acid to distributors which resell to users. Defendant American Potash & Chemical Corporation also sells refined borax and boric acid to distributors located in various States of the United States, which, in turn, resell such products to users.

56. Approximately 90 per cent of all sales of crude borates, refined borax, and boric acid are made in carload lots. All sales of crude borates, refined borax, and boric acid made in the United States in carload lots are made by defendants Pacific Coast Borax Company and American Potash & Chemical Company direct to industrial users or to independent distributors located in the various

[20] State of the United States. These independent distributors in turn resell such products only to those industrial users located in the various States of the United States buying less than carload lots.

### Offenses Charged

57. Beginning prior to the year 1929, the exact date being at this time by plaintiff unknown, the defendants, each well knowing all the matters and things hereinbefore alleged, and continuing thereafter up to and including the date of filing of this Complaint, have been and now are engaged in a combination and conspiracy to restrain unreasonably, and pursuant to said combination and conspiracy, have in fact unreasonably restrained the aforesaid trade and commerce in the mining, production, processing, manufacture, distribution, and sale of crude borates, refined borax, and boric acid among the several States of the United States and with foreign nations, and have conspired and combined to monopolize, have attempted to monopolize, and have succeeded in monopolizing such trade and commerce in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended (15 U.S.C., Sec. 1 and 2), commonly known as the Sherman Act.

58. The aforesaid combination and conspiracy to restrain trade and commerce, the combination and conspiracy to monopolize, attempts to monopolize, and conspiracy to monopolize such trade and com-



merce, have consisted of a continuing agreement and concert of action among the defendants, the substantial terms, purposes, and intent of which have been that defendants:

a. agree to acquire control of approximately 95 per cent of the world's known deposits of borate minerals, including approximately 100 per cent of sodium borate (kernite and tincal) deposits; [21]

(1) by purchase of newly discovered deposits;

(2) by purchase of deposits actively worked by others;

b. agree to acquire by lease or purchase approximately 90 per cent of the world's known lake brines from which borax may be extracted;

c. agree to purchase refining facilities of all competitors who also own deposits of borate minerals;

d. agree to dismantle and close all refining facilities and to close all mines purchased from competitors who work deposits of borate minerals;

e. agree to withhold from the market all colemanite ore where such ore would compete with kernite;

f. agree to permit two United States concerns to produce, refine, buy and sell approximately 5 per cent of the world's supply of refined borax and boric acid on terms dictated by defendants with respect to customers and markets;

g. agree to allocate among themselves the tonnage of crude borates, refined borax, and boric acid that may be sold by each defendant in various nations and in various markets, including the United States market;

h. agree to allocate among themselves consumers of crude borates, refined borax, and boric acid on the basis that the defendant company first supplying a user shall enjoy thereafter the right to sell such user exclusively;

i. agree that each defendant will refuse to sell crude borates, refined borax, and boric acid to customers of any other defendant;

j. agree to reallocate among themselves periodically the amount of tonnage of crude borates, refined borax, and boric acid that may be sold by each defendant in certain nations, in certain markets, and to various types and classes of consumers;

k. agree as to the customers to which certain types of crude borates, refined borax, and boric acid may be sold;

l. agree that no user of crude borates, refined borax, and boric acid may purchase such products except on condition that such user shall not resell or export such products;

m. agree to trace and repurchase any crude borates, refined borax, and boric acid resold or exported by users and to blacklist and boycott such users;

n. agree to permit independent distributors to sell crude borates, refined borax, and boric acid to certain designated customers on terms fixed by the defendants.

o. agree that no sales of refined borax shall be made for packaging by independent distributors;

p. agree that only defendant Borax Consolidated, Ltd., or its subsidiaries shall sell and distribute packaged borax;

q. agree to fix the prices at which crude borates, refined borax, and boric acid will be sold to users and distributors.

- (1) by fixing arbitrary and noncompetitive prices, discounts and conditions of sale on crude borates, refined borax, and boric acid;
- (2) by establishing arbitrary and fixed differentials in the prices to be charged for crude borates, the various types of refined borax, and boric acid;
- (3) by establishing arbitrary and fixed differentials in the prices to be charged users for the same type and quality of crude borates, refined borax, or boric acid based upon the use to which such products are put;
- (4) by fixing a minimum tonnage for a carload of crude borates, refined borax, and boric acid, and selling only on an f.o.b. plant basis, freight allowed to destination;
- (5) by refusing to ship crude borates, refined borax, [23] and boric acid in the United States by any means other than by rail;
- (6) by fixing the prices at which independent distributors of defendants may resell crude borates, refined borax, and boric acid to users to whom defendants permit such independent distributors to resell.

59. During the period of time covered by this Complaint and for the purpose of forming and effectuating the aforesaid combination and conspiracy



to restrain trade unreasonably, combination and conspiracy to monopolize, attempt to monopolize, and actual monopolization of the interstate and foreign trade and commerce hereinbefore alleged, and to destroy competition, the defendants by agreements and concerted action have done the things which as hereinbefore alleged, they conspired to do, and more particularly have done, among others, the following acts and things.

### The Borax Industry in 1929

60. In 1929, the following companies were producing crude borates, refined borax, and boric acid in the United States: Borax Consolidated, Ltd., through its subsidiary, Pacific Coast Borax Company; American Potash & Chemical Corporation; Western Borax Company; West End Chemical Company; and Suckow Borax Mines Consolidated. The total production of these companies amounted approximately 95% of the total world production.

61. Distribution and sale of crude borates, refined borax and boric acid in 1929 was made in the following manner: (a) American Potash & Chemical Corporation sold its refined borax and boric acid in the United States market direct to users and to independent distributors who resold to users. Its sales of the same products in foreign markets, except in the Orient and Canada, were made by C. Christopherson Sons, Ltd., of London, England, acting as agent. Sales in the Orient, except China, were made by Imperial Chemical Industries, Ltd., of

London, England, and in [24] Canada by the St. Lawrence Chemical Company of Montreal, Canada, acting as agents. (b) Pacific Coast Borax Company sold crude borates, refined borax and boric acid in the United States market direct to users or to independent distributors who resold to users. It shipped crude borates to refineries owned by its parent Borax Consolidated, Ltd., and located in London, England; Dunquerque, France; Port Dundas, Glasgow, Scotland; Barcelona, Spain; and Standlau, Austria, where they were refined and sold as refined borax and boric acid by Borax Consolidated, Ltd., in all markets of the world except the United States, and Cuba which were supplied by Pacific Coast Borax Company. (c) Suckow Borax Mines, Consolidated, sold crude borates and refined borax direct to users and to independent distributors who resold to users. Its sales were confined to the United States market and Holland. (d) West End Chemical Company sold its entire production of refined borax and boric acid to Stauffer Chemical Company which, in turn, sold in the United States market, South America, the Orient, and in Europe. (e) Western Borax Company sold crude borates to Deautche Borax Vereingen (hereinafter referred to as DBV), an association of German refiners, which refined the crude borates and sold refined borax and boric acid in Germany and in other European countries. DBV shared equally with Western Borax Company the profits derived from its sales of refined borax and boric acid.

## The 1929 Agreement

62. During the year 1929 various meetings were held in England and Europe between Borax Consolidated, Ltd., American Potash & Chemical Corporation, Pacific Coast Borax Company, and DBV, with the result that in the fall of 1929, in either England or Germany, said companies made and entered into an agreement (herein referred to as the 1929 agreement), under the terms of which prices were fixed at which crude borates, refined borax, and boric acid were to be sold; world markets and customers in specific markets [25] were allocated among them; the production of the West End Chemical Company was limited; and the tonnage to be sold in the United States and other markets by Stauffer Chemical Company and the Western Borax Company was restricted. This agreement and several others to be executed subsequently, was to be effective for one year, renewable annually upon three months' notice prior to expiration by mutual agreement among the parties. They were subsequently extended and modified, and, as modified, are still in full force and effect at the time of the filing of this Complaint. From and after September 1, 1939, the parties to the annual renewal of such agreements were Borax Consolidated, Ltd., Pacific Coast Borax Company, American Potash & Chemical Corporation, and Stauffer Chemical Company. The moving parties to the 1929 agreements and their subsequent annual renewals were Borax Consolidated, Ltd., Pacific Coast Borax Company, American Potash & Chemical Corporation, and DBV (the latter until



September, 1939). The Stauffer Chemical Company and Western Borax Company were forced to adhere to such agreements as will be set forth more particularly hereinafter.

63. As part of the 1929 agreements to fix the terms, conditions, and manner of sale and distribution of crude borates, refined borax, and boric acid, price schedules were adopted for sales by defendants of such products to users and to distributors. Resale prices of distributors were also fixed. It was agreed that all sales made in carload lots in the United States would be made by the parties to the agreements, with less than carload lot sales reserved to distributors or jobbers; that a minimum carload would be 30 tons; that freight charges be made on the basis of all-rail, f.o.b. plant, freight allowed to destination; that the United States be divided into zones in which uniform prices would apply regardless of distance between the refinery and destination; that customers located in the same city, or on the same rail route be prohibited from pooling orders so as to obtain carload prices; [26] that a jobber or distributor be defined as a party or concern taking a minimum of two carloads a year.

64. As part of the 1929 agreements it was agreed that no user be permitted to resell or export any crude borates, refined borax, or boric acid; that no independent distributor be permitted to sell to any user except those approved by the parties to the agreements; that no independent distributor be permitted to export crude borates, refined borax, or boric acid. This restriction has been rigidly en-

forced by a system of espionage under which the parties to the agreements attempt to locate and repurchase any crude borates, refined borax, or boric acid sold contrary to the provisions of the agreements set out in this paragraph. Any user or distributor so selling is blacklisted and boycotted.

65. As part of the 1929 agreements, the parties agreed to allocate among themselves world markets for crude borates, refined borax, and boric acid on the basis of tonnage, customers, and types of use to which such products are put; to divide customers among themselves on the basis that the first supplier offering crude borates, refined borax, and boric acid would thereafter enjoy the exclusive right to supply such user, that no party to the agreement would supply any customers previously supplied by any other party to the agreement, that no party to the agreement would solicit the customers of any other party to the agreement, that no party to the agreement would supply any customers with a new borax product if any other party to the agreement was unable to offer the same product to users in the same general industry.

66. That plaintiff is informed and believes and therefore alleges, that said 1929 agreement constituted a reduction to writing of the previous verbal and written agreements, understandings, combinations and conspiracies of defendants and, from time to time, made and entered into by said defendants during the years previous to the making and entering into of said agreement of 1929.

67. That all of said combinations and conspiracies, acts and things complained of hereinbefore and hereinafter in this [27] complaint set forth, were and are continuing conspiracies and each separate thing and act alleged herein and performed by the defendants, or some of them, or any of them, have been and are now acts, things and combinations contributing to and forming a part of said continuing conspiracy.

68. That pursuant to said 1929 agreement and to said prior conspiracies, agreements, combinations and understandings, defendants, or some of them, proceeded to, and did take, steps and means to eliminate through purchase or otherwise, various competitors of said defendants, not parties to said conspiracy, combination or agreement, including plaintiff as well as the Western Borax Company, the Suckow Borax Mines Consolidated, the Stauffer Chemical Company, the Pacific Alkali Company and other companies, the exact names of which are to plaintiff at this time unknown.

### Dehydrated Borax

69. In 1934, the American Potash & Chemical Corporation perfected a process for the manufacture of dehydrated borax. No sale of such product could be made under the terms of the 1929 agreement, as modified, since other parties to the agreement were unable to offer a similar product. In the fall of 1934 and the spring of 1935 a series of meetings were held in Berlin, Paris, and London between



representatives of Borax Consolidated, Ltd., American Potash & Chemical Corporation and DBV, at which the following agreement with respect to the sale of dehydrated borax was made: allocation of specific customers to whom American Potash & Chemical Corporation might offer dehydrated borax; allocation of the total tonnage of dehydrated borax which American Potash & Chemical Corporation might sell annually in specific markets; agreement by American Potash & Chemical Corporation to furnish other suppliers with dehydrated borax for resale to customers to be agreed upon; the fixing of an arbitrary price at which dehydrated borax would be sold, the price to be fixed at such level as to preserve the [28] prices agreed upon with respect to refined borax; agreement by American Potash & Chemical Corporation to license DBV under patents for the manufacture of dehydrated borax; agreement to reallocate customers using refined borax so as to preserve market allocations agreed upon, in those instances where Pacific Coast Borax Company, Borax Consolidated, Ltd., or DBV lost the business of any customers as a result of purchase by them of dehydrated borax.

70. Since the beginning of World War II, the purchasing commissions of various Allied Governments, including Great Britain, Australia, and South Africa, have sought to buy dehydrated borax since it requires a smaller amount of shipping space than either crude borates, refined borax, or boric acid. Borax Consolidated, Ltd., Pacific Coast Borax Company, and American Potash & Chemical

Corporation refused most of such offers to buy because of the fear that the sale of dehydrated borax might endanger the world price structure in effect on crude borates, refined borax, and boric acid.

### Effects of the Conspiracy

71. The agreements and concerted actions of the defendants alleged in this complaint, both hereinbefore and hereinafter, pursuant to and in furtherance of the conspiracies hereinbefore and hereinafter alleged in this Complaint, have had the effect, as intended by the defendants, of fixing the terms, conditions, and manner in which crude borates, refined borax, boric acid and kernite, are mined, produced, manufactured, distributed, and sold in the United States and foreign countries; of channelizing the system of distribution and sale of such products throughout the United States and in foreign countries; of fixing prices on such products sold to industrial users, as well as resale prices on such products when sold to industrial users, independent distributors of defendants, as well as other terms and conditions of resale; of monopolizing [29] virtually 100% of the world's supply of borate minerals, including 100% (except said "Little Placer") of the world's known deposits of the most valuable, sodium borate (kernite and tincal); of monopolizing approximately 90% of the world's supply of refined borax produced from lake brines; of determining the use to which refined borax and boric acid may be put, as well as the conditions under which they may be used.

## As to the Plaintiff

72. As aforesaid, plaintiff is a corporation incorporated and existing under and by virtue of the laws of the State of Nevada. It was incorporated by G. B. Burnham and others who had previously been engaged in mining and chemical ventures. G. B. Burnham held a certain potash lease from the United States government at Searles Lake, San Bernardino County, California, under the terms of "An act to authorize the Exploration for and Disposition of Potassium" approved October 2, 1917. Such lease was dated the 9th day of September, 1918, and covered 2280 acres. On or about the 1st day of January, 1918, said Burnham entered into a tentative agreement with defendant, Pacific Coast Borax Company, to develop the Burnham Solar Process using its patented land at Searles Lake for such purpose. On or about the 24th day of July, 1918, said Burnham entered into a formal agreement with defendant, Pacific Coast Borax Company, granting it an option for the exclusive license to recover potash and other products by the Burnham Solar Process, at which time and for some time previously patent applications thereon were pending, and which patent applications were subsequently granted and patents issued. It was agreed in said agreement that in the event Pacific Coast Borax Company exercised its option, it would use the processes for the production of potash and other products as extensively as might be commercially practicable insofar as suitable land therefor was available; it was also to pay said



Burnham a royalty of 15 per cent from the net [30] profit derived from the use of said processes;

That on or about the 21st day of September, 1918, said Pacific Coast Borax Company entered into an agreement with said Burnham looking toward the financing of his said lease at Searless Lake and, in this connection, furnished a bond of \$18,000.00 to the United States government to guarantee satisfactory performance of said lease on the part of said Burnham; the land in said lease so held by said Burnham was especially suitable for solar evaporation reservoirs;

On November 11, 1918, the then pending world war came to an end at which time the price of potash began to decline, by reason of which it became necessary to recover, in addition, borax and other chemicals from Searles Lake brine in order to effect an economical recovery of the chemicals in that deposit;

That on the 1st day of May, 1920 the existing agreements of July 24, 1918, and September 21, 1918, between said Burnham and said defendant Pacific Coast Borax Company, were cancelled by reason of the fact that said defendant did not desire to produce borax and other minerals under the terms of the government lease held by said Burnham due to the fact that by the terms of said lease, the price of borax to be produced from said property would be subject to regulation by the President of the United States. Thereafter defendant San Bernardino Borax Mining Company, a subsidiary of defendant Pacific Coast Borax Company, applied to

the Federal Government for a reservoir site upon 3,100 acres of land upon the public domain on the south-west side of Searles Lake, together with incidental rights of way for pipe lines. In said application said San Bernardino Borax Mining Company stated under oath that "the commercial solution of the Searles Lake potash problem is now believed to lie in the development of a process of solar evaporation. This process requires broad areas of shallow ponds with the necessary pipe line connections." Such description covered the [31] solar process developed by said G. B. Burnham. At said time said San Bernardino Borax Mining Company owned 2,240 acres of patented land on the north-west side of said lake; said Burnham and other government lessees at said Searles Lake thereupon protested the granting of said reservoir site and such protest was thereafter sustained;

73. That plaintiff, Burnham Chemical Company, was incorporated under the laws of the State of Nevada on or about the 30th day of March, 1921, with a capital stock of \$100,000.00. To this company said Burnham assigned his said lease and his patented solar evaporation process for recovering various chemicals; that within the next 14 months said plaintiff invested approximately \$150,000.00 in the development of the properties covered by said lease, but, finding that additional capital was necessary, the capital stock of plaintiff was, on or about April 7, 1924, increased to \$10,000,000.00 with 10,000,000 shares of stock at a par value of \$1.00 per share. That interim certificates and the capital stock

of said company were sold to the public during the last half of the year 1922 and the years 1923 and 1924 and up to June 20, 1925, within which time said plaintiff received from the sale of its said stock and invested the same in the development, operation and maintenance of said properties and the business in connection therewith, a sum in excess of \$600,000.00; that said investments by said plaintiff included real estate, buildings, machinery and equipment, pipe lines and water storage, ponds, ditches, wells and equipment, roadways and railroad sidings, power and telephone lines, trucks, tractors, autos and other automotive equipment, furniture and fixtures, overhead and general expenses and costs of experimental and research work;

That on or about the 20th day of June, 1925, a postoffice fraud order was issued against plaintiff and said Burnham as President, and all mail sent to said plaintiff at its office in Reno, Nevada, was ordered returned to the sender; that said fraud [32] order was based solely upon the ground that the patented solar processes transferred by said Burnham to said company were not feasible and would not operate successfully; that said fraud order was brought about largely through protest and demand of a highly placed Federal Government representative who formerly had been, prior to his appointment to such position, the Chicago Manager and representative of defendant Pacific Coast Borax Company; that at the time of making said protest said official was the president of defendant Sterling Borax Company; plaintiff is informed and believes



and therefore alleges, that said activities on the part of said Government official were done on behalf of said defendants herein and in furtherance of said combination and conspiracy and for the purpose of hindering and preventing, if possible, the carrying on of plaintiff's operations under said lease; that said activities of said representative were not discovered by plaintiff or any of its officers until on or about October, 1926;

That at the time of the issuance of said fraud order and for some time prior thereto, plaintiff had been producing and selling certain packaged borax under the trade name "Cinderella" in competition with the product known and sold generally under the trade name of "Twenty-Mule Team" borax and produced and distributed by defendant Pacific Coast Borax Company. That the sale of said Cinderella was handled in large part by mail and was extensively sold in the inter-state commerce but, upon the issuance of said fraud orders, plaintiff was prevented from receiving through said mails the said orders for said packaged borax and was obliged to commence the production and sale of borax in carload lots, which operation it carried on extensively in inter-state and foreign commerce until sometime after defendants, pursuant to said combination and conspiracy and in fraud of plaintiff and in order to eliminate plaintiff as a competitor; reduced the price of borax from \$60.00 per ton f.o.b. Searles Lake, to \$20.00 per ton and [33] subsequently, through various other cuts in price, to the sum of \$18.00 per ton; that said first cut was

made during the month of June, 1928, and by the end of 1928 the price was reduced as aforesaid to \$18.00 per ton; at said time the production of plaintiff's plant was approximately 400 tons per month as against a production of approximately 10,000 tons per month made by defendants; that the cost to plaintiff for production of said borax was approximately \$26.00 a ton and altogether approximately 1,400 tons of borax were produced by it at said cost of \$26.00 a ton, with the result that plaintiff was losing a large amount of money due to said continued reduction in price of said borax, and was therefore obliged to shut down and close its plant in January, 1929, after which time defendants, owing to their control of the production of borax, increased by degrees the price of borax until it returned to the price of approximately \$50.00 a ton; that up to January, 1933, plaintiff had invested \$1,168,564 in the development of its leased property and patented process and its business operations in connection therewith.

74. That upon the issuance of said fraud order, plaintiff protested to the postoffice department against the same and demanded its removal but was unsuccessful in said endeavors to cause the same to be removed, with the result that ultimately, and on or about the month of September, 1925, plaintiff commenced an action in the United States District Court for the District of Nevada to enjoin said postal authorities and the postmaster at Reno, Nevada, from enforcing said fraud order or pro-

ceeding thereunder; that an amended complaint in said action was filed there after during the month of April, 1926; an order to show cause was issued in said action directed to the defendants ordering them to show cause, if any they had, why the Court should not make an order prohibiting them from acting under said fraud order; that due to [34] the crowded calendar of said Court and to the illness of the counsel of plaintiff and to the necessity of properly securing the evidence to be presented on said hearing and for various other causes, the hearing of said order to show cause was not had until late in the year 1929; that during the month of February, 1930, the said Court granted the prayer of plaintiff and enjoined said postal authorities and said postmaster at Reno, Nevada, from preceeding further under said fraud order and from retaining or refusing to deliver mail addressed to said plaintiff;

75. That in May, 1929, said Burnham called upon C. B. Zebriskie, the manager of defendant Pacific Coast Borax Company, at its office in New York City, and protested against the said cuts made by defendants in the price of borax and charged said defendants with as doing for the purpose of eliminating, and with the intent so to do, plaintiff from its operations at Searles Lake and from any competition with the products of defendants; that at said time said Zebriskie denied the said charges of said Burnham and claimed that such cuts were made solely by reason of the discovery of kernite at the Kramer Borax Fields in Kern County, California,



(and which discovery and development is more particularly hereinafter set forth and described) and further stated that defendants had no desire or intention to injure or damage plaintiff; that said Burnham and said plaintiff, believing the statement of said Zebriskie as to the good faith of defendants and the lack of their desire to injure plaintiff, accepted said statements of said Zebriskie as being true; that in truth and fact said statements of said Zebriskie were false and fraudulent and made with the intent and for the purpose of lulling plaintiff into inactivity and in a further endeavor to eliminate plaintiff as a competitor; that the falsity of said statements was not discovered by plaintiff or its officers until on or about the fall of 1944 and upon the commencement of the action by the United States versus certain defendants [35] herein filed in the United States District Court for the Northern District of California, Southern Division, on September 14, 1944, and numbered therein No. 23690-G.

76. That, as aforesaid, the said plant and business of plaintiff was shut down and closed on or about January, 1929, for the reasons herein stated, and thereafter plaintiff struggled on as best it could to survive, but ultimately it was obliged to default in the payment of its rentals due under said Searles Lake lease with the result that the United States of America, as lessor, cancelled said lease and retook possession of said lands and buildings and permanent installations thereon; that thereafter certain

stockholders of plaintiff, in an endeavor to save the situation, applied to said United States government for a lease upon said premises and equipment; said application was subsequently denied and thereafter said lease and improvements were offered for bid, at which time defendant, American Potash and Chemical Company, bid for said lease and was given the same for the sum of approximately \$130,000; (said lease contained certain additional land) thereupon plaintiff was eliminated from further participation in said Searles Lake holdings at a loss and damage to itself of \$1,168,564.00.

#### Little Placer Claim

77. That, on or about the month of August, 1925, sodium borate (later called kernite), was discovered in the Kramer Borax Fields in Kern County, California; thereafter certain development work was done in said fields by various employees of defendants, Pacific Coast Borax Company and United States Borax Company, with the result that on or about September 11, 1926, and at various times thereafter, the said agents or employees of said defendants filed applications for mineral patents upon, or otherwise obtained all of said Kramer Borax Fields except ten acres thereof, known thereafter as the "Little Placer Claim", or "Little Placer"; that [36] in said applications the United States Government was not advised of said discovery of sodium borate in said fields; that subsequent to September, 1926, a patent was issued to said applicants in pursuance of their said application.

78. As set forth in paragraph 71 of this Complaint, the defendants, Borax Consolidated, Ltd., and Pacific Coast Borax Company, have controlled since 1934, and now control, all of the world's known kernite deposits except ten acres thereof, known as said the "Little Placer Claim". Ever since June of the year 1928, plaintiff has been endeavoring to secure a lease from the said United States Government upon said "Little Placer" under and by virtue of the laws appertaining thereto, but all of such endeavors of plaintiff have been contested, fought and blocked by the actions of the defendants herein in pursuance to the said unlawful plan and conspiracies of said defendant to own, control and market all borax in all its forms and products, in all the world, and to prevent competition therein and to that end, to drive plaintiff from all activities and business in the field of borax and its ownership, production and sale;

That the facts of said endeavor of plaintiff to secure said lease upon said "Little Placer", and the opposition of defendants thereto, is as follows:

That, on or about June 1, 1928, Burnham Chemical Company, plaintiff herein, filed application for Sodium Prospecting Permit Los Angeles 045676 for certain lands, including the SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of NE $\frac{1}{4}$  of Section 24, T. 11 N, R. 8 W, SBM, Kern County, California, known as the "Little Placer";

On August 1, 1928, the defendant, United States Borax Company, filed mineral application Los Angeles 045946 for the said SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of NE $\frac{1}{4}$  of Section 24;



On December 23, 1928, the Commissioner of the General Land Office directed a hearing between said Burnham Chemical Company [37] and said mineral applicant, in which the Government intervened, for the purpose of determining whether or not said land was valuable for sodium in one of the forms described in the Leasing Act of February 25, 1920, and whether that fact was known on the date of said mining location.

On February 9, 1929, part of application 045676 of said Burnham Company for a prospecting permit was rejected by the Commissioner because of the report of the Geological Survey that the land contained sodium salts in commercial quantities and was subject to entry only under lease. Thereafter, said Burnham Company filed its application, Los Angeles 046681, for a sodium lease on certain lands, including a sodium lease upon said "Little Placer", which application was suspended by reason of conflict with said mineral application;

The said hearing directed as above was held in June and July of 1929, and as a result thereof the Department, on March 8, 1933, affirmed concurring decisions below in favor of said mineral claimant and held that the deposits found in said land were not within the purview of section 23 of the Act of February 25, 1920, prior to its amendment;

On May 3, 1933, the Commissioner advised the Register at Los Angeles that the Departmental decision of March 8, 1933, had become final; that Sodium Lease Application 046681 was finally rejected; and that Mineral Application 045946 was released

from suspension. Final certificate issued on the mineral application August 1, 1933;

On May 17, 1937, the Commissioner directed adverse proceedings against mineral entry 045946, charging, in effect, that said land contained valuable deposits of sodium as described in the Act of February 25, 1920, and that discovery was not made until September 19, 1927, at which time the deposits were known to exist, which prevented a location being made thereon under the mining laws; [38]

On October 15, 1937, said Burnham Chemical Company made application for reinstatement of its application for Sodium Lease 046681 upon the ground that the Department had not issued patent to the land and had decided that its action in denying the sodium lease was erroneous for the reason that said land was known to contain borates of sodium, and that the applicant was entitled to priority. On the same day, said Burnham Company made similar application for reinstatement of its application for Prospecting Permit 045676;

A hearing upon the charges preferred by the Commissioner, as above stated, was held by the Register in February and March, 1938, and on October 6, 1938, said Register rendered his decision sustaining the charges and recommending that said mineral entry be cancelled. Said mineral claimant appealed, and the matter was pending before said Commissioner until November 21, 1941, when said appeal of said mineral claimant was denied and the mineral entry was held for cancellation.

Thereafter said mineral claimant appealed from said decision of said Commissioner to the Secretary of the Interior who in turn and upon April 28, 1943 affirmed said Commissioner's decision and pursuant thereto said mineral application was cancelled; that thereupon said mineral applicant petitioned for a rehearing which was denied upon the 31st day of July 1944. That in due course thereafter Defendant United States Borax Company filed an action in the District Court of the United States for the District of Columbia, entitled United States Borax Company, a corporation, Plaintiff, versus Harold L. Ickes, Secretary of the Interior, Defendant, and numbered Civil Action No. 25789, to enjoin said Secretary of the Interior from cancelling said Little Placer Mineral Entry; said defendant in due course filed his motion for summary Judgment and which motion is now pending.

79. That, on or about May 11, 1939, plaintiff filed with [39] the General Land Office, Department of Interior, Washington, D. C., a

“Petition for Consideration of Application for Reinstatement of Application for Sodium Prospecting Permit Los Angeles 045676 and of Application for Sodium Lease Los Angeles 046681 of Burnham Chemical Company in Connection with Disposition of Appeal of Mineral Applicant in M. E. Los Angeles 045946 of United States Borax Company.”



That said Petition is still pending;

80. That all of the actions and activities of the defendants, or some of them, in contesting the said application of plaintiff for said sodium lease upon said "Little Placer", were performed and carried out by said defendants for the purpose of preventing plaintiff from securing said lease upon said "Little Placer", and through which desired lease plaintiff would have been able to enter into competition with defendants in the production, manufacture and sale of borax in its various forms.

81. That all of the above acts done and performed by defendants, or some of them, have been pursuant to and in furtherance of said conspiracies, plans and combinations hereinbefore in this complaint set forth and described and with the intent and purpose of controlling and dominating, throughout the world and in interstate commerce, the mining, production and sale of borax in all its various forms and products and with the intent and purpose of injuring and destroying the plaintiff's activities as herein set forth and removing plaintiff as a competitor of defendants, or some of them, in the said mining, production and sale of borax in all its forms; that due to said intents, purposes and acts of defendants, plaintiff has been damaged in the sum of \$1,168,564, neither the whole nor any part of which has been paid plaintiff.

82. That, by the provisions of U.S.C.A.-T 15, Sec. 15, plaintiff is entitled to have and recover

treble damages for the losses and injuries inflicted upon it by defendants as herein set forth, and therefore alleges that it is entitled to recover, and [40] there is due it, from defendants, three times the amount of said damages, and so, as aforesaid, suffered by it, together with a reasonable attorney's fee and cost also provided for in said U.S.C.A.-T 15, Sec. 15.

Wherefore, plaintiff prays:

1. Judgment against defendants in the sum of \$1,168,564.

2. That said amount of damages, or any amount of damages allowed or awarded plaintiff herein, be trebled, as provided for in U.S.C.A.-T 15, Sec. 15.

3. For interest.

4. For reasonable attorney's fees as provided for in U.S.C.A.-T 15, Sec. 15.

5. For costs of suit.

6. For such other and further relief as to this honorable court it seem fit and proper.

/s/ STERLING CARR,

Attorney for Plaintiff.

[Endorsed]: Filed July 3, 1946. [41]

[Title of District Court and Cause.]

MOTIONS OF DEFENDANT UNITED STATES  
BORAX COMPANY TO QUASH SERVICE  
OF SUMMONS AND TO DISMISS FOR  
IMPROPER VENUE AND FOR LACK OF  
JURISDICTION OVER THE PERSON OF  
DEFENDANT, TO DISMISS FOR FAIL-  
URE TO STATE A CLAIM UPON WHICH  
RELIEF MAY BE GRANTED, TO DISMISS  
BECAUSE THE ACTION IS BARRED BY  
THE STATUTE OF LIMITATIONS AND  
TO STRIKE

United States Borax Company, named as a defendant herein, appearing specially for the sole purpose of making these motions, hereby moves the court:

I.

To quash purported service of summons and to dismiss the action as against it for improper venue, that is, on the ground that United States Borax Company may not be sued in the Northern District of California because (a) jurisdiction of this Court is invoked solely on the ground that the action arises under the Constitution and laws of the United States, and (b) at the time of the commencement of this action the said United States Borax Company was, ever since has been, and now is, a corporation incorporated under the laws of the State of West Virginia and an inhabitant thereof, was at no time mentioned above and is not a resident or inhabitant of the Northern District of California or found in the Northern District of California, or transacting



business in the Northern District of California, and at no such time has had or now has an agent in the Northern District of California, all of which more clearly appears in the accompanying affidavit of S. M. Nelson, and in the copies, certified by the Secretary of State of California and attached to said affidavit, of the "Statement and Certificate of [42] United States Borax Company, a West Virginia corporation, of change of location of its principal office and of new address of its agent for service of process" filed with said Secretary of State on October 4, 1938, and of the certificate of the Secretary of State of the State of West Virginia, filed with the Secretary of State of California on December 13, 1943.

## II.

In the alternative, and if the foregoing motion is denied, to dismiss the action as against it on the ground that the complaint fails to state a claim on which relief can be granted.

## III.

In the alternative, if the motion to dismiss for improper venue and lack of jurisdiction is denied, to dismiss the action as against it on the following grounds, severally:

1. That the action is barred by the Statute of Limitations.

2. That the action is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That the action is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the right of action set forth in the complaint did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years. [43]

5. That the right of action set forth in the complaint did not accrue within three years next before September 14, 1944 but accrued, if at all, prior to said date.

6. That the right of action set forth in the complaint did not accrue within three years next before October 10, 1942 but accrued, if at all, prior to said date.

#### IV.

In the alternative, and if none of the foregoing motions is granted, to strike from the complaint the allegations of each of the paragraphs of the complaint listed below, and severally each and every one of the allegations contained in said paragraphs, on the ground that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All of paragraph 2 of the complaint.
2. All of paragraph 26 of the complaint.
3. All of paragraph 27 of the complaint.
4. All of paragraph 28 of the complaint.
5. All of paragraph 29 of the complaint.
6. All of paragraph 30 of the complaint.
7. All of paragraph 31 of the complaint.
8. All of paragraph 34 of the complaint.

9. All of paragraph 35 of the complaint.
10. All of paragraph 36 of the complaint.
11. All of paragraph 37 of the complaint.
12. All of paragraph 38 of the complaint.
13. All of paragraph 39 of the complaint.
14. All of paragraph 40 of the complaint.
15. All of paragraph 41 of the complaint.
16. All of paragraph 42 of the complaint. [44]
17. All of paragraph 44 of the complaint.
18. All of paragraph 45 of the complaint.
19. All of paragraph 46 of the complaint.
20. All of paragraph 49 of the complaint.
21. All of paragraph 50 of the complaint.
22. All of paragraph 51 of the complaint.
23. All of paragraph 52 of the complaint.
24. All of paragraph 53 of the complaint.
25. All of paragraph 54 of the complaint.
26. All of paragraph 55 of the complaint.
27. All of paragraph 56 of the complaint.
28. All of subsection (a) of paragraph 58 of the complaint.
29. All of subsection (c) of paragraph 58 of the complaint.
30. All of subsection (d) of paragraph 58 of the complaint.
31. All of subsection (e) of paragraph 58 of the complaint.
32. All of subsection (g) of paragraph 58 of the complaint.
33. All of subsection (h) of paragraph 58 of the complaint.
34. All of subsection (j) of paragraph 58 of the complaint.



35. All of subsection (k) of paragraph 58 of the complaint.
36. All of subsection (l) of paragraph 58 of the complaint.
37. All of subsection (m) of paragraph 58 of the complaint.
38. All of subsection (n) of paragraph 58 of the complaint. [45]
39. All of subsection (o) of paragraph 58 of the complaint.
40. All of subsection (i) of paragraph 58 of the complaint.
41. All of paragraph 61 of the complaint.
42. All of paragraph 62 of the complaint.
43. All of paragraph 63 of the complaint.
44. All of paragraph 64 of the complaint.
45. All of paragraph 65 of the complaint.
46. All those portions of paragraph 68 of the complaint beginning with the word "various" in line 9 on page 28 and running to the end of said paragraph, with the exception of the word "plaintiff" in line 11.
47. All of paragraph 69 of the complaint.
48. All of paragraph 70 of the complaint.
49. All of paragraph 71 of the complaint.
50. All of paragraph 72 of the complaint, excluding the first three sentences thereof.
51. That portion of paragraph 73 of the complaint appearing on page 33 thereof and reading as follows:

"that said fraud order was brought about largely through protest and demand of a highly

placed Federal Government representative who formerly had been, prior to his appointment to such position, the Chicago Manager and representative of defendant Pacific Coast Borax Company; that at the time of making said protest said official was the president of defendant Sterling Borax Company; plaintiff is informed and believes and therefore alleges that said activities on the part of said government official were done on [46] behalf of said defendants herein and in furtherance of said combination and conspiracy and for the purpose of hindering and preventing, if possible, the carrying on of plaintiff's operations under said lease."

52. All of paragraph 77 of the complaint.

53. All of paragraph 78 of the complaint.

54. All of paragraph 79 of the complaint.

55. All of paragraph 80 of the complaint.

56. All of paragraph 81 of the complaint.

Each of the foregoing motions is based on all the pleadings and papers on file herein, including this written motion. The motion to quash service of summons and dismiss the action for improper venue is also based on the accompany affidavit of S. M. Nelson, and the copies, certified by the Secretary of State of California, and annexed to said affidavit, of the "Statement and Certificate of United States Borax Company, a West Virginia Corporation, of change of location of its principal office and of new address of its agent for service of process" filed with said Secretary of State on October 4, 1938, and of the certificate of the Secretary of State of the

State of West Virginia filed with the Secretary of the State of California on December 13, 1943. The other motions will also be based on the accompanying affidavit of Moses Lasky and Exhibits 1 to 5 inclusive, attached to said affidavit, being photostatic copies of certain original records on file in the United States District Court for the District of Nevada, in that certain case entitled "Burnham Chemical Company, George B. Burnham and V. E. Scott, Plaintiffs vs. George F. Smith, Postmaster of the [47] United States, in charge of the Post Office at Reno, Nevada," Equity No. E. 75, as follows: "Amended Complaint" filed April 14, 1926, "Affidavit in Support of Motion for Temporary Injunction" executed by George B. Burnham and filed January 15, 1930, a certain document marked in said cause Defendants' Ex. F., a certain "Stipulation" dated January 14, 1930 and filed January 15, 1930, and a certain Post Office Fraud Order No. 3006.

Dated: San Francisco, October 29, 1945.

NEWLIN, HOLLEY,

SANDMEYER & COLEMAN,

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER &

HARRISON,

Attorneys for defendant

United States Borax

Company.

(Admission of Service Noted.)

[Endorsed]: Filed Oct. 29, 1945. [48]



[Title of District Court and Cause.]

AFFIDAVIT OF S. M. NELSON IN SUPPORT  
OF MOTION OF DEFENDANT UNITED  
STATES BORAX COMPANY TO DISMISS

State of California,  
County of Los Angeles—ss.

S. M. Nelson, being first duly sworn, deposes and says:

That he is now and continuously since October 1, 1943, has been the Secretary of United States Borax Company, a corporation, one of the defendants in the above-entitled action.

That in December 1899, United States Borax Company was incorporated under the laws of the State of West Virginia and thereafter and prior to January 1901, said corporation complied with all state laws of the State of California with reference to foreign corporations doing business in the State of California, and continuously thereafter has been and now is duly authorized and empowered to do intrastate business in the State of California. That prior to the year 1938, said corporation changed its principal office and place of business in California to the City of Los Angeles, in the County of Los Angeles, State of California, and thereafter and in the year 1938 said corporation filed with the Secretary of State of California a written statement setting forth the location and address of its principal office within the State of California, to wit, 510 West Sixth Street, in the City of Los Angeles,

County of Los Angeles, State of California; the name of a person residing within the State of California upon whom process directed to such corporation may be served and his complete business address, to wit, C. R. Dudley, 510 West Sixth Street, Los Angeles, California, and said corporation's irrevocable consent to such service and to service of process on the Secretary of State if said agent or his successor be no longer authorized to act or cannot be found at the said address. That on the 8th day of September, 1943, the Articles of Incorporation of said corporation were amended at a meeting of the stockholders of said corporation regularly held on said date, at which meeting a majority of the issued and outstanding voting stock of said corporation was represented and voted for said resolution; that by said amendment the principal office and place of business of said corporation [49] was changed to and fixed at the City of Los Angeles, State of California. That a copy of said resolution so amending the Articles of Incorporation of said corporation, certified under the signature of the Vice President of said corporation and the corporate seal of said corporation, was filed with the Secretary of State of the State of West Virginia. That a copy of said amendment to the Articles of Incorporation of said corporation, duly certified by the Secretary of the State of West Virginia, was filed with the Secretary of the State of California, on or about the 13th day of December, 1943, and that a copy thereof, certified by the Secretary of State of the State of California, was filed on or about De-

cember 17, 1943, with the County Clerk of the County of Los Angeles, the county in which said corporation had and has its principal place of business in the State of California, and in December, 1943, like certified copies of said amendment were filed with the County Clerks, respectively, of the Counties of Kern and Inyo, in the State of California, the only two counties in said state in which said corporation owns any real property.

The United States Borax Company is the owner and holder of certain unpatented mining claims in the Counties of Kern and Inyo, State of California. That none of said mining claims are operated except for the performance of required assessment work thereon. That said corporation, as lessee, is the owner and holder of a mineral lease from the State of California, known as State Mineral Lease No. 15, covering certain real property in the County of Inyo, State of California. Said corporation operates the property covered by said mineral lease and produces borate ore therefrom. That since October 1, 1943, said corporation has owned no real property in the State of California other than in the Counties of Kern and Inyo in said state, and since said date said corporation has owned or possessed no real or personal property in the State of California other than in the Counties of Kern, Inyo and Los Angeles in said state. That continuously since 1943, the principal office and place of business of said corporation and its principal office and place of business in the State of California has been and now is in the City of Los Angeles, County of Los



Angeles, State of California, and that all of its records and books have been and now are there located. That the officers of said corporation consist of a President, Vice President, Secretary and Treasurer. That continuously since 1943, all of said officers have been and now are residents of the County of Los Angeles, State of California, and perform their duties as such officers of said corporation in said County of Los Angeles. That [50] the only business and activities in which said corporation engages in the State of California is the ownership and assessment work on the unpatented mining claims in the Counties of Kern and Inyo, the mining and production of borate ore from the property in the County of Inyo covered by the California state mineral lease, and the handling of the business affairs of said corporation in the County of Los Angeles. That most of the borate ore mined in Inyo County, California, is shipped from said county to points in other states. That a small amount of said borate ore is shipped to and sold in the County of Los Angeles, State of California.

That since October, 1943, United States Borax Company has had and now has no office or place of business within the boundaries of the Judicial District of the Northern District Court of the United States nor in any of the Counties of Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Lake, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Sonoma, Napa, Yolo, Placer, Solano, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Stanislaus, Tuol-

umne, Alpine, Mono, San Francisco, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, Santa Cruz, Monterey or San Benito, in the State of California. That said corporation does not now have nor has it any time since October 1943, had any officer or employee resident of or located in said Northern Judicial District, nor in any of said counties. That said corporation does not now and has not since October, 1943, carried on any business in any of said counties. That on July 5, 1945, said corporation shipped from Inyo County, California, to Selby, California, one carload of crude borate ore. That said shipment was made pursuant to an order therefor received by said corporation from New York City, New York. That except for said one shipment said defendant corporation has not shipped any ore or other products into any of the counties hereinabove named subsequent to October, 1943.

That at all times since 1938, C. R. Dudley has been and now is the designated agent of United States Borax Company upon whom process directed to said corporation may be served. That at all times since 1938, said C. R. Dudley has been and now is a resident of the County of Los Angeles, State of California, and at all of said times his business address has been and now is 510 West Sixth Street, Los Angeles, California. [51]

That on July 9, 1945, the summons in the above-entitled action directed to defendant United States Borax Company, with a copy of the complaint, was served upon W. W. Cahill, President of said corporation, at 510 West Sixth Street, in the City of

Los Angeles, County of Los Angeles, State of California. That so far as affiant has any knowledge no process in said action directed to said corporation has been served upon any other person or at any other time or place.

(Receipt of Service)

S. M. NELSON.

Subscribed and sworn to before me this 23rd day of October, 1945.

[Seal] DOROTHY S. UPDEFRAFF,  
Notary Public in and for the County of Los Angeles, State of California. [52]

State of California

Office of the Secretary of State

[Seal]

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That I have compared the annexed transcript with the record on file in my office, of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

In witness whereof, I hereunto set my hand and affix the Great Seal of the State of California this 18th day of October, 1945.

[Seal] FRANK M. JORDAN,  
Secretary of State.

By: CHAS. J. HAGERTY,  
Deputy.

Filed in the office of the Secretary of State of the State of California, Oct. 4, 1938. Frank M. Jordan, Secretary of State; by: Chas. J. Hagerty.



STATEMENT AND CERTIFICATE OF  
UNITED STATES BORAX COMPANY, A  
WEST VIRGINIA CORPORATION, OF  
CHANGE OF LOCATION OF ITS PRIN-  
CIPAL OFFICE AND OF NEW ADDRESS  
OF ITS AGENT FOR SERVICE OF  
PROCESS

United States Borax Company, a West Virginia corporation, hereby states:

1. That said corporation has heretofore filed in the office of the California Secretary of State a statement of the location of its principal office in said state, and of the name of the person upon whom process directed to said corporation might be served.

2. That said corporation has changed the location and address of its principal office within the State of California, and that the new location and address of its principal office within said state is 510 West Sixth Street, in the City of Los Angeles, County of Los Angeles, State of California.

3. That the person heretofore named as agent of said corporation upon whom process directed to said corporation may be served, has changed his business address and that his name and his complete new business address is C. R. Dudley, 510 West Sixth Street, Los Angeles, California.

4. That United States Borax Company hereby irrevocably consents that such process may be served on its agent herein designated and that in the event the agent so designated, or his successor,

is no longer authorized to act or cannot be found at the address given, service of such process may be made on the Secretary of State of the State of California.

In witness whereof, said corporation has caused its corporate name to be hereunto subscribed and its corporate seal to be impressed hereon this 29th day of September, 1938.

[Seal]                      UNITED STATES BORAX  
                                    COMPANY,

By [signature illegible]  
President.

By [signature illegible]  
Secretary.

Filed in the office of the Secretary of State of the State of California, Dec. 13, 1943. Frank M. Jordan, Secretary of State.

Secretary of State, Corporation Number 604-A.

Certificate—State of West Virginia

I, Wm. S. O'Brien, Secretary of State of the State of West Virginia, hereby certify that C. R. Dudley, Vice-President of United States Borax Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the law of said State, at the principal office of said corporation, in the City of Los Angeles, State of California, on the

8th day of September, 1943, at which meeting a majority of the issued and outstanding voting stock of such corporation being represented by the holders thereof, in person, by bodies corporate or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to wit:

“Whereas, it is deemed to be for the best interests of this corporation that the principal office and place of business of the corporation be located at 510 West 6th Street, Los Angeles, California; and

“Whereas, it is declared in Article Tenth of the Charter of this corporation that the principal office of the corporation be located in the City and County of San Francisco, State of California;

“Now, therefore, be it resolved that the first sentence of the second paragraph of Article Tenth of the Charter of this corporation be amended to read as follows:

“Which said corporation shall have its principal office and place of business at the City of Los Angeles, State of California, and is to expire on the 6th day of December, 1949; and [55]

“Be it further resolved, that the president or vice-president of this corporation is hereby authorized and directed under his signature and the seal of the corporation to certify this resolution and the fact and manner of the adoption hereon to the Secretary of State of West Virginia, and to take such further action as may be necessary and proper to effect the amendment of the Charter of this cor-



poration herein provided in accordance with the laws of the State of West Virginia.”

“Wherefore, I do declare that the principal office or place of business of said corporation shall hereafter be at 510 West 6th Street, Los Angeles, California.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this thirtieth day of September, 1943.

(G.S.)                      WM. S. O'BRIEN,  
Secretary of State.

### CERTIFICATE

State of West Virginia

[Seal]

I, Wm. S. O'Brien, Secretary of State of the State of West Virginia, hereby certify that the foregoing is a true and correct copy of the certificate of the change of the principal office and place of business of the United States Borax Company to 510 West 6th Street, Los Angeles, California, as appears from the records of my said office.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this third day of December, 1943.

[Seal]                      W. S. O'BRIEN,  
Secretary of State.

[Endorsed]: Filed Oct. 29, 1945. [57]

[Title of District Court and Cause.]

MOTIONS OF DEFENDANT PACIFIC COAST  
BORAX COMPANY TO DISMISS FOR  
FAILURE TO STATE A CLAIM ON  
WHICH RELIEF MAY BE GRANTED, TO  
DISMISS BECAUSE THE ACTION IS  
BARRED BY THE STATUTE OF LIMITA-  
TIONS, AND TO STRIKE

Defendant Pacific Coast Borax Company hereby  
moves the Court:

I.

To dismiss the action as against it on the ground  
that the complaint fails to state a claim on which  
relief can be granted.

II.

To dismiss the action as against it on the follow-  
ing grounds, severally:

1. That the action is barred by the Statute of  
Limitations.

2. That the action is barred by the provisions of  
Subdivision (1) of Section 338 of the California  
Code of Civil Procedure.

3. That the action is barred by the provisions of  
Subdivision (4) of Section 338 of the California  
Code of Civil Procedure.

4. That the right of action set forth in the com-  
plaint did not accrue within three years next before  
the commencement of the action but accrued, if at  
all, prior to said three years.

5. That the right of action set forth in the complaint did not accrue within three years next before September 14, 1944 but accrued, if at all, prior to said date.

6. That the right of action set forth in the complaint did not accrue within three years next before October 10, 1942 but accrued, if at all, prior to said date. [58]

### III.

In the alternative, if the motions to dismiss above referred to are not granted, to strike from the complaint the allegations of each of the paragraphs of the complaint listed below, and severally each and every one of the allegations contained in said paragraphs, on the ground that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All of paragraph 2 of the complaint.
2. All of paragraph 26 of the complaint.
3. All of paragraph 27 of the complaint.
4. All of paragraph 28 of the complaint.
5. All of paragraph 29 of the complaint.
6. All of paragraph 30 of the complaint.
7. All of paragraph 31 of the complaint.
8. All of paragraph 34 of the complaint.
9. All of paragraph 35 of the complaint.
10. All of paragraph 36 of the complaint.
11. All of paragraph 37 of the complaint.
12. All of paragraph 38 of the complaint.
13. All of paragraph 39 of the complaint.
14. All of paragraph 40 of the complaint.



15. All of paragraph 41 of the complaint.
16. All of paragraph 42 of the complaint.
17. All of paragraph 44 of the complaint.
18. All of paragraph 45 of the complaint.
19. All of paragraph 46 of the complaint.
20. All of paragraph 49 of the complaint.
21. All of paragraph 50 of the complaint.
22. All of paragraph 51 of the complaint.
23. All of paragraph 52 of the complaint.
24. All of paragraph 53 of the complaint. [59]
25. All of paragraph 54 of the complaint.
26. All of paragraph 55 of the complaint.
27. All of paragraph 56 of the complaint.
28. All of subsection (a) of paragraph 58 of the complaint.
29. All of subsection (c) of paragraph 58 of the complaint.
30. All of subsection (d) of paragraph 58 of the complaint.
31. All of subsection (e) of paragraph 58 of the complaint.
32. All of subsection (g) of paragraph 58 of the complaint.
33. All of subsection (h) of paragraph 58 of the complaint.
34. All of subsection (j) of paragraph 58 of the complaint.
35. All of subsection (k) of paragraph 58 of the complaint.
36. All of subsection (l) of paragraph 58 of the complaint.
37. All of subsection (m) of paragraph 58 of the complaint.

38. All of subsection (n) of paragraph 58 of the complaint.
39. All of subsection (o) of paragraph 58 of the complaint.
40. All of subsection (i) of paragraph 58 of the complaint.
41. All of paragraph 61 of the complaint.
42. All of paragraph 62 of the complaint.
43. All of paragraph 63 of the complaint. [60]
44. All of paragraph 64 of the complaint.
45. All of paragraph 65 of the complaint.
46. All those portions of paragraph 68 of the complaint beginning with the word "various" in line 9 on page 28 and running to the end of said paragraph, with the exception of the word "plaintiff" in line 11.
47. All of paragraph 69 of the complaint.
48. All of paragraph 70 of the complaint.
49. All of paragraph 71 of the complaint.
50. All of paragraph 72 of the complaint, excluding the first three sentences thereof.
51. That portion of paragraph 73 of the complaint appearing on page 33 thereof and reading as follows:

"that said fraud order was brought about largely through protest and demand of a highly placed Federal Government representative who formerly had been, prior to his appointment to such position, the Chicago Manager and representative of defendant Pacific Coast Borax Company; that at the time of making said pro-

test said official was the president of defendant Sterling Borax Company; plaintiff is informed and believes and therefore alleges that said activities on the part of said government official were done on behalf of said defendants herein and in furtherance of said combination and conspiracy and for the purpose of hindering and preventing, if possible, the carrying on of plaintiff's operations under said lease."

52. All of paragraph 77 of the complaint.

53. All of paragraph 78 of the complaint.

54. All of paragraph 79 of the complaint.

55. All of paragraph 80 of the complaint. [61]

56. All of paragraph 81 of the complaint.

Each of the foregoing motions is based on all the pleadings and papers on file herein, including this written motion, and on the accompanying affidavit of Moses Lasky and Exhibits 1 to 5 inclusive, attached to said affidavit, being photostatic copies of certain original records on file in the United States District Court for the District of Nevada, in that certain case entitled "Burnham Chemical Company, George B. Burnham and V. E. Scott, Plaintiffs vs. George F. Smith, Postmaster of the United States, in charge of the Post Office at Reno, Nevada." Equity No. E. 75, as follows: "Amended Complaint" filed April 14, 1926, "Affidavit in Support of Motion for Temporary Injunction" executed by George B. Burnham and filed January 15, 1930, a certain document marked in said cause Defendants' Ex. F., a certain "Stipulation" dated January 14,



1930 and filed January 15, 1930, and a certain Post Office Fraud Order No. 3006.

Dated: San Francisco, October 29, 1945.

NEWLIN, HOLLEY,  
SANDMEYER & COLEMAN,  
/s/ MAURICE E. HARRISON,  
/s/ MOSES LASKY,  
BROBECK, PHLEGER &  
HARRISON,

Attorneys for defendant  
Pacific Coast Borax  
Company.

(Admission of service noted.)

[Endorsed]: Filed Oct. 29, 1945. [62]

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[Title of District Court and Cause.]

AFFIDAVIT OF MOSES LASKY IN SUP-  
PORT OF MOTIONS TO DISMISS FILED  
BY UNITED STATES BORAX COMPANY  
AND DEFENDANT PACIFIC COAST  
BORAX COMPANY

State of California,  
City and County of San Francisco—ss.

Moses Lasky, being first duly sworn, deposes and  
says:

He is one of the attorneys for United States Borax  
Company and Pacific Coast Borax Company.

On Monday and Tuesday, September 24 and 25,  
1945, he temporally examined, at the office of the

Clerk of the United States District Court for the District of Nevada, the files in that certain case in said court entitled "Burnham Chemical Company, George B. Burnham and V. E. Scott, plaintiffs vs. George F. Smith, Postmaster of the United States in charge of the Post Office at Reno, Nevada," being numbered in the files of said court Equity Case No. E-75. There is in said files an original document entitled Amended Complaint, 77 pages in length, verified by George B. Burnham, president of the plaintiff in the present case. Said amended complaint was filed in said suit on April 14, 1926. Affiant caused said amended complaint to be photostated. Attached hereto as Exhibit 1 is a true, complete and exact photostatic copy of said original amended complaint.

There is also on file in said equity suit No. E-75 a certain document identified as Defendants' Ex. "F", being a printed letter over the signature of G. B. Burnham dated April 1926 and addressed to the stockholders of Burnham Chemical Company. Affiant caused said defendants' Exhibit F to be photostated, and attached hereto marked Exhibit 2 is a full, complete and exact photostatic copy of said defendants' Ex. "F".

There is also on file in said Equity Case No. E-75 a certain original document entitled "Affidavit in Support of Motion for Temporary Injunction," being an affidavit executed by said George B. [63] Burnham on January 14, 1930 and filed in said Equity Case No. E-75 on January 15, 1930. Affiant caused said original affidavit of George B. Burnham

to be photostated, and attached hereto marked Exhibit 3 is a true, complete and exact photostatic copy of said affidavit.

As appears by the records of said Clerk of the United States District Court for the District of Nevada, a hearing was held before the Honorable Frank H. Norcross, District Judge, on January 15, 16 and 17, 1930 upon plaintiffs' motion for a temporary injunction, and at said hearing on January 15, 1930, the above mentioned affidavit of George B. Burnham was offered by counsel for Burnham Chemical Company and George B. Burnham and was received, and plaintiffs' application for temporary injunction was predicated also upon said amended complaint, all of which appears from Exhibit 4 attached hereto and from the minutes of said court of Wednesday, January 15, 1930 as the same appear at page 636 of Volume 4 of the Equity Journal, which affiant personally read. Said minutes read as follows:

(Caption and number of the case omitted here.)

“This being the time heretofore fixed for hearing on plaintiffs' petition for an injunction herein and upon defendant's motion to strike from the complaint, and the same coming on regularly this day, Messrs. B. D. Townsend, Esq. and E. F. Lunsford, Esq. appeared for and on behalf of the plaintiff, Francis J. Heney, Esq. not being present; and H. H. Atkinson, United States Attorney, and his assistants, G. A. Whitely and G. A. Montrose, appeared for defendant. Reporter called upon usual terms.



Mr. Townsend files his stipulation that all papers and files in this case up to the present time be considered in this hearing; also files affidavit of George B. Burnham in support of motion for a temporary injunction. Upon stipulation of counsel it is agreed that the hearing herein had at this time be upon the motion for a temporary injunction and upon defendant's motion to strike from the bill of complaint. Argument. Mr. Townsend makes his opening argument, and at 3:47 o'clock p.m. recess was declared until tomorrow morning at 10 o'clock."

There is also on file in said equity suit No. E-75 a certain document entitled "Stipulation" dated January 14, 1930 and filed January 15, 1930. Affiant caused said stipulation to be photostated, and attached hereto marked Exhibit 4 is a true complete and exact photostatic copy of said stipulation.

The allegation of the complaint in the instant case in paragraph 74 on page 35 that during the month of February 1930 the United States District Court for the District of Nevada granted the prayer of the plaintiff and enjoined the postal authorities and the Postmaster at Reno, Nevada from proceeding under the Post Office fraud order is misleading, as appears from the records in said case, Equity No. E-75. The hearing held January 1930 in said case as appears from said minutes, was a hearing on a motion for a temporary injunction. The only injunction ever issued in said case was a temporary injunction, which was issued pursuant to an order dated February 3, 1930, and entitled "Order Granting Temporary Injunction and Setting Case for Trial." The said order, which appears as a written

paper and also in the minutes of said Court at page 652 of Volume 4 of the Equity Journal, under date of February 3, 1930, also set the cause for trial on its merits on April 15, 1930. It appears from the records that the case was never tried, and that under date of October 24, 1935, in Volume 5 of the Equity Journal, at page 776, appears the following order:

(Caption and number omitted here.)

“The United States Attorney consenting thereto, it is ordered that this case be, and the same hereby is dismissed for lack of prosecution.”

It is thus a matter of record that on October 24, 1935 said suit of Burnham Chemical Company, et al vs. Smith, etc., was dismissed and that the Post Office fraud order which was issued against the Burnham Chemical Company in 1925 is and has been ever since in full force and effect. [65]

There also is in the files in said equity suit No. E-75 a copy of the Post Office fraud order, the enforcement of which plaintiff in said action sought to enjoin. Affiant caused said fraud order to be photostated, and attached hereto marked Exhibit 5 is a true, complete and exact photostatic copy of said Post Office fraud order.

MOSES LASKY.

Subscribed and sworn to before me this 27th day of October, 1945.

[Seal] EUGENE P. JONES,  
Notary Public in and for the City and County of  
San Francisco, State of California. [66]

## EXHIBIT 2

## Defendant's Ex. "F"

Officers: B. G. Burnham, President; C. W. Whitney, Vice-President; E. D. Burnham, Secretary Treasurer. Natural Resources: 8,000,000 Tons Borax, 6,000,000 Tons Potassium Chloride, 30,000,000 Tons Sodium Carbonate, 30,000,000 Tons Sodium Sulphate, 60,000,000 Tons Sodium Chloride. Works at Westend, San Bernardino County, California.

Burnham Chemical Company, 212 Nevada State Life Building, Reno, Nevada.

## Important Information—Legal Proceedings

April 1926.

To the Stockholders of the  
Burnham Chemical Company:

In our suit to enjoin the enforcement of the fraud order, the Post Office Department filed an answer, by which, in effect, they refused to admit or deny nearly all of the facts stated in our original complaint; and took the position that the Court cannot consider any of the facts, excepting such as the Post Office Inspectors disclosed to the Solicitor during the proceedings in the Post Office Department.

By their defense, the Post Office Department seek to evade the true facts in the case. The unfairness of this attempted defense is apparent, especially in



view of the fact that during the proceedings before the Solicitor, the Post Office Inspectors and attorneys concealed nearly all of the facts and evidence in their possession, and which were favorable to the Burnham Chemical Company. For example: The U. S. Bureau of Mines investigated the processes, plant and development of the Burnham Chemical Company, at the request of the Post Office Department and expressly for the information of the Postmaster-General. They made a report of the results of this investigation. It was favorable to the Burnham Chemical Company. But this report was concealed; even the fact that the investigation had been made was concealed; and false statements and arguments were substituted, by which the Solicitor and the Postmaster-General were deceived as to the true facts.

Having concealed the truth from the Solicitor and the Postmaster-General, now, by their answer, the Post Office Department seek to conceal the truth from the Court. Thus, the issuance of the fraud order was obtained by fraud and deception; and the perpetrators of the fraud now seek to defeat justice by imposing upon the Court the same fraud [67] and deception which they imposed upon the Solicitor and the Postmaster-General.

To meet this remarkable defense, our attorneys concluded to file an amended complaint, setting forth in detail the fraudulent concealments, deceptions and misrepresentations practiced by the Post

Office Department itself, during the proceedings before the Solicitor; asking the Court to compel the Post Office Department to disclose the true facts and asking the Court to relieve the Burnham Chemical Company from the unjust consequences of these fraudulent concealments, deceptions and misrepresentations.

The amended complaint was prepared and filed April 14th. The Post Office Department must now answer this amended complaint, which reverses the issue, and charges the Post Office Department itself with fraud. The preparation of this amended complaint involved a large amount of work and consumed more than four months' time. However, the work was pushed as rapidly as possible, as you will realize when you read the amended complaint.

A few of the stockholders have asked us for an explanation of the delay in our legal proceedings; and doubtless all of you have been interested to know. Our attorneys advised us not to discuss the subject until the amended complaint had been actually filed, and then to mail to each of the stockholders an exact duplicate of the amended complaint as a complete answer to all inquiries.

Pursuant to this advice, a copy of the amended complaint will be mailed to each of the stockholders within the next three days, and this letter is addressed to you to prepare you for the amended complaint which is to come.

The first nine pages of the amended complaint are much the same as the original complaint, which was filed October 1, 1925. But you will find a great deal of new and interesting information in the pages which follow. [68]

It is your duty, not only to your company, but yourself, to read this amended complaint.

Be sure to read it thoroughly and completely, and then ask yourself the following question:

Who has been guilty of fraud, the Burnham Chemical Company or the Post Office Department?

BURNHAM CHEMICAL  
COMPANY,

By G. B. BURNHAM,  
President.

GBB/SA

(Here follows Exhibit 1, which is identical with Defendants' Exhibit C introduced at the trial of the special issues.)

(Here follows Exhibit 3, which is identical with Defendants' Exhibit P introduced at the trial of the special issues.) [69]



## EXHIBIT 4

In the District Court of the United States  
for the District of Nevada

No. . . . .

BURNHAM CHEMICAL COMPANY, GEORGE  
B. BURNHAM AND V. E. SCOTT,

Plaintiffs,

vs.

GEORGE F. SMITH, POSTMASTER of the  
United States, in charge of the Post Office at  
Reno, Nevada,

Defendant.

## STIPULATION

It is hereby stipulated by and between the parties  
of the above-entitled proceeding:

## I.

That the papers and files upon which the motion  
for temporary injunction shall be deemed to have  
been made, and upon which such motion shall be  
heard and determined, shall include all papers,  
records and files in such action down to the time  
that such motion shall be heard, and shall not be  
limited to the papers, records and files existing at  
the time such motion was filed: supplemental motion  
being hereby expressly waived.

## II.

The affidavit of G. B. Burnham, which shall be  
filed contemporaneously herewith, and a copy of

which has been this day handed to undersigned United States Attorney, shall also be included in the papers, records and files to be used and considered upon such motion. Said affidavit is offered to explain delay in calling present motion for hearing.

Dated: January 14, 1930. [70]

FRANCIS J. HENEY,  
B. D. TOWNSEND,  
E. F. LUNSFORD,  
Attorneys for Plaintiffs.  
H. W. ATIKINSON.

Filed Jan. 15, 1930.

C. O. PATTERSON,  
Clerk.

EXHIBIT 5

(Copy)

Deft. Ex. "A"

Order No. (Illegible)

Post Office Department, Washington

June 20, 1925

It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the Burnham Chemical Company, and G. B. Burnham, President, at Reno Nevada, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of the act of Congress entitled "An act to amend certain

sections of the Revised Statutes relating to lotteries, and for other purposes," approved September 19, 1890, said evidence being more fully described in the memorandum of the Solicitor for the Post Office Department of the date of June 15, 1925, and by authority vested in the Postmaster General by said act, and by the act of Congress entitled "An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," approved March 2, 1895, the Postmaster General hereby forbids you to pay any Postal Money Order drawn to the order of said concern & party and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern & party to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the Division of Dead



Letters with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

/s/ W. IRVING GLOVER,

Acting Postmaster General.

Case No. (Illegible) To the Postmaster, Reno, Nevada.

S. C. Receipt of a copy of the within is hereby admitted this 29th day of Oct., 1945.

STERLING CARR,

Attorney for Pltf.

[Endorsed]: Filed Oct. 29, 194<sup>5</sup>~~7~~. [73]

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[Title of District Court and Cause.]

NOTICE OF MOTIONS OF DEFENDANT  
BORAX CONSOLIDATED, LTD. to DIS-  
MISS FOR FAILURE TO STATE A CLAIM  
ON WHICH RELIEF MAY BE GRANTED,  
TO DISMISS BECAUSE THE ACTION IS  
BARRED BY THE STATUTE OF LIMITA-  
TIONS, AND TO STRIKE

To Burnham Chemical Company, the plaintiff, and  
to Sterling Carr, Esq., its attorney:

Please Take Notice, hereby given, that on Tues-  
day, December 4, 1945, at the hour of 10 o'clock  
a.m., or as soon thereafter as counsel can be heard,  
in the courtroom of the above-entitled court, before

the Honorable Louis E. Goodnan, District Judge, in the Post Office Building, in the City and County of San Francisco, State of California, defendant Berax Consolidated, Ltd. will move the court as follows:

I.

To Dismiss the action as against it on the ground that the complaint fails to state a claim on which relief can be granted.

II.

To Dismiss the action as against it on the following grounds, severally:

1. That the action is barred by the Statute of Limitations.

2. That the action is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That the action is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the right of action set forth in the complaint did not accrue within three years next before the [74] commencement of the action but accrued, if at all, prior to said three years.

5. That the right of action set forth in the complaint did not accrue within three years next before September 14, 1944, but accrued, if at all, prior to said date.

6. That the right of action set forth in the complaint did not accrue within three years next before October 10, 1942, but accrued, if at all, prior to said date.

## III.

In the alternative, if the motions to dismiss above referred to are not granted, To Strike from the complaint the allegations of each of the paragraphs of the complaint listed below, and severally each and every one of the allegations contained in said paragraphs, on the ground that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All of paragraph 2 of the complaint.
2. All of paragraph 26 of the complaint.
3. All of paragraph 27 of the complaint.
4. All of paragraph 28 of the complaint.
5. All of paragraph 29 of the complaint.
6. All of paragraph 30 of the complaint.
7. All of paragraph 31 of the complaint.
8. All of paragraph 34 of the complaint.
9. All of paragraph 35 of the complaint.
10. All of paragraph 36 of the complaint.
11. All of paragraph 37 of the complaint.
12. All of paragraph 38 of the complaint.
13. All of paragraph 39 of the complaint.
14. All of paragraph 40 of the complaint. [75]
15. All of paragraph 41 of the complaint.
16. All of paragraph 42 of the complaint.
17. All of paragraph 44 of the complaint.
18. All of paragraph 45 of the complaint.
19. All of paragraph 46 of the complaint.
20. All of paragraph 49 of the complaint.
21. All of paragraph 50 of the complaint.



22. All of paragraph 51 of the complaint.
23. All of paragraph 52 of the complaint.
24. All of paragraph 53 of the complaint.
25. All of paragraph 54 of the complaint.
26. All of paragraph 55 of the complaint.
27. All of paragraph 56 of the complaint.
28. All of subsection (a) of paragraph 58 of the complaint.
29. All of subsection (c) of paragraph 58 of the complaint.
30. All of subsection (d) of paragraph 58 of the complaint.
31. All of subsection (e) of paragraph 58 of the complaint.
32. All of subsection (g) of paragraph 58 of the complaint.
33. All of subsection (h) of paragraph 58 of the complaint.
34. All of subsection (j) of paragraph 58 of the complaint.
35. All of subsection (k) of paragraph 58 of the complaint.
36. All of subsection (l) of paragraph 58 of the complaint.
37. All of subsection (m) of paragraph 58 of the complaint. [76]
38. All of subsection (n) of paragraph 58 of the complaint.
39. All of subsection (o) of paragraph 58 of the complaint.
40. All of subsection (i) of paragraph 58 of the complaint.

41. All of paragraph 61 of the complaint.

42. All of paragraph 62 of the complaint.

43. All of paragraph 63 of the complaint.

44. All of paragraph 64 of the complaint.

45. All of paragraph 65 of the complaint.

46. All those portions of paragraph 68 of the complaint beginning with the word "various" in line 9 on page 28 and running to the end of said paragraph, with the exception of the word "plaintiff" in line 11.

47. All of paragraph 69 of the complaint.

48. All of paragraph 70 of the complaint.

49. All of paragraph 71 of the complaint.

50. All of paragraph 72 of the complaint, excluding the first three sentences thereof.

51. That portion of paragraph 73 of the complaint appearing on page 33 thereof and reading as follows:

"that said fraud order was brought about largely through protest and demand of a highly placed Federal Government representative who formerly had been, prior to his appointment to such position, the Chicago Manager and representative of defendant Pacific Coast Borax Company; that at the time of making said protest said official was the president of defendant Sterling Borax Company; plaintiff is informed and believes and therefore alleges that said activities on the part of said [77] government official were done on behalf of said defendants

herein and in furtherance of said combination and conspiracy and for the purpose of hindering and preventing, if possible, the carrying on of plaintiff's operations under said lease."

52. All of paragraph 77 of the complaint.

53. All of paragraph 78 of the complaint.

54. All of paragraph 79 of the complaint.

55. All of paragraph 80 of the complaint.

56. All of paragraph 81 of the complaint.

Each of the foregoing motions is and will be based on all the pleadings and papers on file herein, including this written notice of motion, and on the affidavit of Moses Lasky executed October 27, 1945 and filed herein on October 29, 1945 in support of Motions to Dismiss of United States Borax Company and Pacific Coast Borax Company, hereby adopted in support of the instant motions, and upon Exhibits 1 to 5 inclusive, attached to said affidavit, being photostatic copies of certain original records on file in the United States District Court for the District of Nevada, in that certain case entitled "Burnham Chemical Company, George B. Burnham and V. E. Scott, Plaintiffs, vs. George F. Smith, Postmaster of the United States, in charge of the Post Office at Reno, Nevada," Equity No. E 75, as follows: "Amended Complaint" filed April 14, 1926, "Affidavit in Support of Motion for Temporary Injunction" executed by George B. Burnham and filed January 15, 1930, a certain document marked in said cause Defendants' Ex. F., a certain



“Stipulation” dated January 14, 1930 and filed January 15, 1930, and a certain Post Office Fraud Order No. 3006. [78]

Dated: San Francisco, November 24, 1945.

NEWLIN, HOLLEY, SAND-  
MEYER & COLEMAN,  
MAURICE E. HARRISON,  
MOSES LASKY,  
BROBECK, PHLEGER &  
HARRISON,

Attorneys for defendant  
Borax Consolidated, Ltd.

Points and Authorities in Support  
of Foregoing Motions

Defendant Borax Consolidated, Ltd. hereby adopts the “Memorandum in Support of Motions of United States Borax Company and Defendant Pacific Coast Borax Company to Dismiss and to Strike” filed herein on November 2, 1945.

(Admission of service noted.)

[Endorsed]: Filed Nov. 23, 1945.

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[Title of District Court and Cause.]

AMERICAN POTASH & CHEMICAL CORPOR-  
ATION'S AMENDED MOTIONS TO DIS-  
MISS THE ACTION AND TO STRIKE  
PARTS OF THE COMPLAINT

Now comes the defendant, American Potash & Chemical Corporation, and without admitting any

of the allegations of the complaint, submits the following motions:

I.

Motion to Dismiss the Complaint

Defendant, American Potash & Chemical Corporation, moves to dismiss the complaint on the ground that the complaint fails to state a claim on which relief can be granted.

II.

Motion to Dismiss the Complaint

Defendant, American Potash & Chemical Corporation moves to dismiss the complaint on the following grounds, severally:

1. That the action is barred by the Statute of Limitations.
2. That the action is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.
3. That the action is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.
4. That the right of action set forth in the complaint did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years.
5. That the right of action set forth in the complaint did not accrue within three years next before [80] September 14, 1944, but accrued, if at all, prior to said date.

6. That the right of action set forth in the complaint did not accrue within three years next before October 10, 1942, but accrued, if at all, prior to said date.

### III.

#### Motion to Strike Parts of Complaint

Defendant, American Potash & Chemical Corporation, in the alternative to the motions numbered I and II hereof, moves to strike the following portions of the complaint for the reason that the same are immaterial, redundant, impertinent and scandalous, to-wit:

(1) The last sentence in paragraph 7 on page 4 of the complaint;

(2) All of that portion of paragraph 44 on page 15 of the complaint following the word "California" in the third from the last line of said paragraph;

(3) All of paragraph 45 on pages 15 and 16 of the complaint;

(4) All of paragraph 46 on page 16 of the complaint;

(5) All of that portion of paragraph 48 on pages 16 and 17 of the complaint following the figures "1926" in the seventh line of said paragraph;

(6) All of that portion of paragraph 51 on page 18 of the complaint following the words "Western Borax Company" which are the first three words in the twelfth line from the top of page 18;

(7) All of paragraph 52 on page 18 and 19 of the complaint; [81]



(8) All of paragraph 53 on page 19 of the complaint;

(9) All of that portion of paragraph 57 on page 21 of the complaint as follows:

(a) Beginning with the last word in the third line of said paragraph down to and including the seventh word in the fifth line of said paragraph which reads "and continuing thereafter up to and including the date of filing of this complaint, have been and now are".

(b) Beginning with the fourth word in the seventh line of said paragraph and ending with the sixth word in said line which reads "have in fact".

(c) The seventh word in the eleventh line of said paragraph, being the word "have."

(d) The third word in the twelfth line and the eighth word in the twelfth line, both being the word "have".

(10) The word "have", being the second word in the fourth line, paragraph 58, page 21, of the complaint;

(11) All of paragraph 60 on page 24 of the complaint;

(12) All of paragraph 61 on page 24 and 25 of the complaint;

(13) All of paragraph 62 on page 25 and 26 of the complaint;

(14) All of paragraph 63 on page 26 and 27 of the complaint;

(15) All of paragraph 64 on page 27 of the complaint; [82]

(16) All of paragraph 65 on page 27 of the complaint;

(17) All of paragraph 68 on page 28 of the complaint;

(18) All of paragraph 69 on page 28 and 29 of the complaint;

(19) All of paragraph 70 on page 29 of the complaint;

(20) All of paragraph 77 on page 36 of the complaint;

(21) All of paragraph 78 on page 37 and 38 of the complaint;

(22) All of paragraph 79 on page 39 of the complaint;

(23) All of paragraph 80 on page 40 of the complaint;

Each of said motions is based on all pleadings and papers on file herein, including this written motion, and on the affidavit of Moses Lasky and Exhibits One to Five inclusive, attached to said affidavit, said affidavit having been filed in this cause in support of the Motion to Dismiss and to Strike of the defendant Pacific Coast Borax Company.

OLIVER & DONNALLY,  
WILLIAM J. FROELICH,  
CHARLES A. BEARDSLEY,  
PHILIP M. AITKEN.

Attorneys for Defendant,  
American Potash & Chem-  
ical Corporation. [83]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Nov. 27, 1945. [84]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Now comes plaintiff above named and, pursuant to Rule 15, Section (A), files this its amendment to its complaint on file herein.

I.

Add to said complaint a new paragraph No. 81-A and to follow immediately paragraph 81 of said complaint, viz:

That plaintiff had no knowledge of said conspiracies and combinations herein set forth or the intent or purposes of said defendants in the performance of the acts herein in this complaint set forth until on or about the commencement of an action by the United States versus certain defendants herein and filed in the United States District Court for the Northern District of California, Southern Division, on September 14, 1944 and numbered therein 23690-G; that likewise plaintiff had no knowledge of said 1929 agreement referred to hereinabove and described in paragraphs 62 to 68, inclusive, or of the said prior, or said subsequent agreements made pursuant to said 1929 agreement, until the said time of the filing of said action by said United States against said defendants herein on or about September 14, 1944; that while plaintiff did have knowledge of certain acts, things and proceedings taken, had and engaged in by said defendants, or some of them, and as herein set forth, it had no knowledge, information or belief, or any opportunity to secure such knowledge or information, of the fact of the



fraudulent and illegal formation [85] of said 1929 conspiracy or the said prior agreements which led thereto, or of said subsequent agreements, and was without knowledge or means of knowledge that all of said things, acts and proceedings of defendants, or some of them, as herein in this complaint set forth were so performed and carried out in fraud of plaintiff and pursuant to said 1929 agreement, or said prior or said subsequent agreements, until subsequent to the filing by said United States of said action against said defendants, or some of them, on September 14, 1944; that all of said acts and things of defendants, and herein set forth, were done, carried on and performed pursuant to said fraudulent conspiracies and combinations, and as a part thereof, and in fraud of plaintiff and others and to destroy the business and competition of plaintiff; that the formation of said conspiracies and combination and the doing, performance and carrying on by defendants of the said things, acts and plans herein set forth were so done, performed or carried on pursuant to said conspiracies and combinations and were fraudulently concealed from plaintiff and others similary situated in order to prevent plaintiff, or said others, from bringing actions against defendants, or some of them, under the Anti-Trust laws of the United States; that plaintiff had no knowledge or information or means of knowledge or information of the formation of said conspiracies, combinations or agreements until on or about the commencement by said United States of said action against said defendants on September 14, 1944. [86]

## II.

Plaintiff further amends said complaint by adding thereto the following paragraph to be known as 81-B and to follow immediately after said paragraph 81-A.

That said defendants, or certain of them, the exact ones of which being to plaintiff unknown at this time, fraudulently caused their books and records during various times herein set forth to be changed, altered, destroyed or substituted in an endeavor to prevent, and with the intent of preventing, the true facts, situations and purposes of defendants in the carrying on of said conspiracies and combinations herein set forth, from being known or discovered by plaintiff, or other parties, and in order to give a false, fraudulent and incorrect statement of their, or some of their, affairs, conditions, activities and purposes; that plaintiff had no knowledge or information or means of knowledge or information of the facts herein in this paragraph 81-A alleged until subsequent to the commencement of said action of the United States filed September 14, 1944 and hereinabove described.

STERLING CARR,

Attorney for Plaintiff.

(Verification)

[Endorsed]: Filed Dec. 4, 1945. [87]

[Title of District Court and Cause.]

STIPULATIONS RE MOTIONS  
OF DEFENDANTS

Whereas, on October 29, 1945, defendant United States Borax Company filed herein its Motion to Quash Service of Summons and to Dismiss for Improper Venue and For Lack of Jurisdiction Over the Person of the Defendant, to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted, to Dismiss Because the Action is Barred by the Statute of Limitations, and to Strike, and

Whereas, on the same day defendant Pacific Coast Borax Company filed herein its Motion to Dismiss for Failure to State a Claim On Which Relief May Be Granted, to Dismiss Because the Action is Barred by the Statute of Limitations and to Strike, and

Whereas, on November 23, 1945, defendant Borax Consolidated, Ltd. filed herein its Motion to Dismiss for Failure to State a Claim on Which Relief May Be Granted, to Dismiss Because the Action is Barred by the Statute of Limitations, and to Strike, and

Whereas, on November 27, 1945, defendant American Potash & Chemical Corporation filed herein its Amended Motion to Dismiss the Action and to Strike Parts of the Complaint, and

Whereas, on November 29, 1945, plaintiff filed herein an Amendment to the Complaint, by which it added two paragraphs to its original complaint,



It Is Hereby Stipulated by and between the parties hereto that each of the above mentioned motions [88] may be deemed to be directed in all respects to the complaint as amended.

Dated: December 4, 1945.

STERLING CARR,  
Attorney for Plaintiff.

NEWLIN, HOLLEY,  
SANDMEYER & COLEMAN,  
MAURICE E. HARRISON,  
MOSES LASKY,  
BROBECK, PHLEGER &  
HARRISON,

Attorneys for Defendants United States Borax  
Company, Pacific Coast Borax Company and  
Borax Consolidated, Ltd.

OLIVER & DONNALLY,  
WILLIAM J. FROELICH,  
CHARLES A. BEARDSLEY,  
PHILIP M. AITKEN,  
Attorneys for Defendant  
American Potash & Chemi-  
cal Corporation

So Ordered,

LOUIS E. GOODMAN,  
District Judge.

Dated: December 4, 1945.

[Endorsed]: Filed Dec. 4, 1945. [89]

[Title of District Court and Cause.]

### STIPULATION

Whereas, on October 29, 1945, defendants United States Borax Company and Pacific Coast Borax Company, and on November 23, 1945, defendant Borax Consolidated, Ltd. filed herein their motions to dismiss for failure to state a claim upon which relief may be granted and to dismiss because the action is barred by the Statute of Limitations; and on November 27, 1945, defendant American Potash & Chemical Corporation filed herein its amended motion to dismiss the action; and

Whereas, on November 29, 1945, plaintiff filed herein an "Amendment to the Complaint," by which it added two paragraphs to its original complaint, and on December 4, 1945, pursuant to stipulation of the parties, it was ordered by the Court that each of the above-mentioned motions might be deemed to be directed in all respects to the complaint as amended; and

Whereas, thereafter, during the hearing on said motions which occurred on December 4 and 5, 1945, it appeared that the plaintiff took the position that said motions could not and should not be treated or regarded as motions for summary judgment under Rule 56 of the Rules of Civil Procedure, and claimed that it had not so regarded them and for that reason had not proffered affidavits in opposition to the affidavit and evidentiary showing filed in support of said motions, but it further appeared that the defendants took the position that such motions could and should be treated and regarded as,

and are, motions for summary judgment, total and partial, as well as being motions to dismiss directed to the complaint as amended; [90]

Now, Therefore, but without prejudice to the respective contentions of the parties as to the nature of the motions in the absence of this stipulation, It Is Hereby Stipulated by and between the parties as follows:

1. Said motions may and shall be deemed to be not only motions to dismiss but also motions for summary judgment, total and/or partial, under said Rule 56;

2. Within forty days from date of this stipulation plaintiff may file such affidavits as it may desire in opposition to said motions for summary judgment; within twenty days from date of this stipulation the defendants may file in further support of said motions for summary judgment such further affidavits, as and if they desire, and within fifteen days after plaintiff's affidavits are filed, defendants may file affidavits in response to the plaintiff's affidavits, and the plaintiff, within five days after defendants' time for filing their reply affidavits has expired or after said affidavits have been filed or within five days after defendants have advised plaintiff's counsel that they do not intend to file reply affidavits, may apply to the court, on 24 hours' notice to defendants' counsel, for leave to offer oral testimony in opposition to said motions for summary judgment, and defendants shall be free to oppose such application.

3. In the event that both the motions to dismiss and the motions for summary judgment are denied,



this stipulation shall be without prejudice to plaintiff's right to apply for a separate trial of the issue of the Statute of Limitations or any other issue, under Rule 42 of the Rules of Civil Procedure, and it shall be without prejudice to the right of any defendant to oppose such application. [91]

4. The submission of the foregoing motions, heretofore made on December 4, 1945, may be set aside.

Dated January 11, 1946.

STERLING CARR,  
Attorney for Plaintiff.

NEWLIN, HOLLEY,  
SANDMEYER & COLEMAN,  
MAURICE E. HARRISON,  
MOSES LASKY,  
BROBECK, PHLEGER &  
HARRISON,

Attorneys for defendants United States Borax  
Company, Pacific Coast Borax Company, and  
Borax Consolidated, Ltd.

OLIVER & DONNALLY,  
WILLIAM J. FROELICH,  
CHARLES A. BEARDSLEY,  
PHILIP M. AITKEN,

Attorneys for defendant  
American Potash & Chemical  
Corporation.

So Ordered: LOUIS E. GOODMAN,  
District Judge.

Dated: January 15th, 1946.

[Endorsed]: Filed Jan. 15, 1946. [92]

[Title of District Court and Cause.]

FURTHER AFFIDAVIT OF MOSES LASKY  
IN SUPPORT OF DEFENDANTS' MO-  
TION TO DISMISS AND FOR A SUM-  
MARY JUDGMENT

State of California,

City and County of San Francisco—ss.

Moses Lasky, being first duly sworn, deposes and says:

He has in his possession photostatic copies of papers and letters constituting file No. Los Angeles 046681 of the United States Department of the Interior, General Land Office, certified August 2, 1945 under the hand of A. E. Donham, Acting Commissioner of the General Land Office, and the seal of the Department of the Interior General Land Office, at Washington, D. C. as being a "true and literal exemplification of the originals and records on file" in said General Land Office in the custody of said Acting Assistant Commissioner.

Among the photostatic copies in that certified file are copies of two letters, one dated September 21, 1934, and the other dated November 28, 1934, each written by Burnham Chemical Company, signed by G. B. Burnham, President, and addressed to Honorable Harold L. Ickes, Secretary of the Interior, Washington, D. C. The photostatic copies in said certified file are negatives, and affiant has caused positive copies to be made directly from the negatives of said two letters. Attached hereto as

Exhibit A is the positive copy of the said letter dated September 21, 1934, and attached hereto as Exhibit B is the positive copy of said letter dated November 28, 1934. [93]

The passages to which defendants particularly call attention are the following:

In the letter of November 28, 1934:

“There are only three principle producers of borax in the world today, namely the Pacific Coast Borax Company and the American Potash and Chemical Company, both controlled by English capital and known as the ‘Borax Trust’. In fact they may be classed as one producer, since they both operate under English control. The West End Chemical Company at Searles Lake is the third producer. There are no other borax producers, because they have now all been bought out by the Trust.”

In the letter of September 21, 1934:

“In the Summer of 1928 this company, after overcoming many difficulties, succeeded in completing it's borax plant upon it's lease property and produced and sold 1427 tons of refined borax. No sooner had we started production than a most drastic cut in the price of borax occurred. Prior to our production borax sold for about \$50. per ton f.o.b. Searles Lake, California. Immediately upon starting production in June 1928 the price was cut to about \$30. per ton F.O.B. Searles Lake. This was the lowest price in the history of the borax busi-



ness. Soon thereafter it was cut even lower, until finally the price was reduced to \$18. per ton. Our cost of production was \$26. per ton and [94] therefore it was impossible for us to continue to operate and produce borax. The prevailing price of borax has remained at approximately this same low figure of \$18. per ton f.o.b. plant.

“The reason our competitor has been able to maintain this low price is because of his illegal acquisition in 1926 of the most valuable and most economical source of sodium borate in the world. This is a new source of borax and is known as the Kramer borax deposit.

\* \* \*

“Therefore, by illegally acquiring a source of cheap borax supply our competitor, the Pacific Coast Borax Company, have made it impossible for us to produce borax at a profit at present prices.

“It is not fair nor just that the Government should now take steps to cancel our lease upon Searles Lake due to the nonpayment of our rent, or the nonproduction of the minerals thereon when the cause of such default is due to the false and deceitful action of our competitor, whose main object is to get patent to sodium borate lands and to drive out all competition and hold a monopoly of the borax business. Nor it it fair that the Government continue to allow an illegal patent on sodium borate lands to continue to the end that the Borax Trust can obtain continued ownership and thereby drive out of business a government leasee,

such as ourselves, who must pay a royalty on production [95] and who obtains its lands and mineral deposits by legal and lawful methods.

“\* \* \* For six years we have been defending the interests of the People of the United States against the illegal practices of the Borax Trust. We had to carry on our battle with meager funds, whereas, the Borax Trust had unlimited money at its disposal. After the six years of struggle in our fight for the Peoples interest, is it fair to cancel our Searles Lake lease because we have no money left to pay the rent? \* \* \*”

MOSES LASKY,

Subscribed and sworn to before me this 29th day of January, 1946.

[Seal]                   EUGENE P. JONES,  
Notary Public in and for the City and County of  
San Francisco, State of California.

(Admission of service noted)

(Here follows Exhibit A—Statement that is identical with Defendant's Ex. U and Exhibit B—Statement that is identical with Defendant's Ex. V.)

[Endorsed]: Filed Jan. 29, 1946. [96]

[Title of District Court and Cause.]

AFFIDAVIT OF J. C. LYNCH IN SUPPORT  
OF MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

State of New York,  
County of New York—ss.

J. C. Lynch, being first duly sworn, deposes and says:

I am Secretary of Pacific Coast Borax Company and have occupied that position since April 1937. I was Chief Accountant of Pacific Coast Borax Company from August 31, 1918 to December 9, 1941, and have been employed in the Accounting and Sales Department since June 1, 1916. I have knowledge, both personal and from the records of the Company, of the prices which the Company has charged for Borax at all times mentioned in this affidavit.

The following tables give the price per ton charged by Pacific Coast Borax Company for Borax in barrels or bags in carload quantities in the Eastern Territory of the United States from January 1920 to February 1942, together with the dates of changes. The Eastern Territory consists of that portion of the United States east of the Rocky Mountains. Until 1933 almost all Borax sold in the United States was sold in the Eastern Territory. The price of Borax in barrels or bags in the Eastern Territory is the basic quotation for Borax in



the trade. Borax was formerly sold in barrels but has been sold in bags since the early 1920's.

January 12, 1920.....	\$165.00	
December 20, 1920.....	135.00	
March 7, 1921.....	120.00	
May 2, 1921.....	115.00	
May 30, 1921.....	110.00	
August 15, 1921.....	105.00	
May 12, 1924.....	95.00	
October 25, 1926.....	80.00	
September 19, 1927.....	75.00	
June 7, 1928.....	60.00	
June 28, 1928.....	50.00	
April 19, 1929.....	44.00	
November 11, 1929.....	47.00	
March 23, 1932.....	36.00	
June 17, 1935.....	40.00	
June 7, 1937.....	42.00	
July 1, 1938.....	43.00	
February 6, 1942.....	45.00	Authorized by OPA

Burnham Chemical Company at no time produced Boric Acid. The following table sets forth the price per ton charged by Pacific Coast Borax Company for Boric Acid in barrels or bags in carload quantities in the Eastern Territory from January 1920 to February 1942 with the dates of changes:

January 12, 1920.....	\$285.00
December 13, 1920.....	300.00
January 3, 1921.....	295.00
January 21, 1921.....	305.00
February 21, 1921.....	290.00
March 7, 1921.....	260.00
August 1, 1921.....	265.00
August 15, 1921.....	250.00
February 20, 1922.....	230.00
June 7, 1923.....	200.00
September 10, 1923.....	190.00

May 12, 1924.....	170.00
October 25, 1926.....	160.00
June 7, 1928.....	140.00
January 14, 1929.....	110.00
November 11, 1929.....	120.00
March 23, 1932.....	80.00
June 17, 1935.....	95.00
July 1, 1938.....	96.00
February 6, 1942.....	99.00 Approved OPA

The changes in the price of Borax and Boric Acid in the Eastern Territory in the years above referred to were reported at substantially the times when such changes took place in the "Oil Paint, and Drug Reporter", which is and was, at all the times mentioned, the generally recognized [98] trade journal in the entire chemical industry.

J. C. LYNCH.

Subscribed and sworn to before me this 24th day of January 1946.

[Seal]                      GEORGE E. GABEL,  
Notary Public, Kgs. Co. No. 650 Reg. No. 306-G-7.  
Cert. filed in NYCo. No. 479 Reg's No. 394-G-7.  
Commission expires March 30, 1947.

(Receipt of Service.)

[Endorsed]: Filed Jan. 29, 1946. [99]

[Title of District Court and Cause.]

AFFIDAVIT OF F. M. JENIFER IN SUPPORT  
OF DEFENDANTS' MOTION TO DISMISS  
AND FOR A SUMMARY JUDGMENT

State of California,  
County of Los Angeles—ss.

F. M. Jenifer, being first duly sworn, deposes and says:

I am the President of the defendant Pacific Coast Borax Company and have occupied that position since 1937. I have been in the employ of Pacific Coast Borax Company since 1927. I became a Vice President of Pacific Coast Borax Company on or about July, 1929. Continuously from January 1925 to January 1937, Mr. R. C. Baker was President of Pacific Coast Borax Company. Mr. R. C. Baker died in January 1937. Mr. John Ryan was the President and General Manager of Pacific Coast Borax Company for many years prior to January 1925. Mr. John Ryan died many years ago. Mr. C. B. Zabriskie was Vice President and General Manager of Pacific Coast Borax Company from January 1, 1925, until August 1, 1933, at which time he resigned. Mr. Zabriskie died in February 1936.

At all times from January 1, 1929, to 1933 the executive control and management of Pacific Coast Borax Company was in the hands of Mr. R. C.



Baker and Mr. C. B. Zabriskie, both of whom are dead.

F. M. JENIFER.

Subscribed and sworn to before me this 24th day of January, 1946.

[Seal]

DOROTHY S. UPDEGRAFF,

Notary Public in and for said  
County and State.

(Admission of Service noted.)

[Endorsed]: Filed Jan. 29, 1946. [100]

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[Title of District Court and Cause.]

AFFIDAVIT OF PHILIP M. AITKEN IN SUP-  
PORT OF AMENDED MOTIONS TO DIS-  
MISS FILED BY AMERICAN POTASH &  
CHEMICAL CORPORATION AND MO-  
TION FOR SUMMARY JUDGMENT.

State of Nebraska,  
Lancaster County—ss.

Philip M. Aitken, being first duly sworn, deposes and says: That he is one of the attorneys for the American Potash & Chemical Corporation,

1. That under date of January 12, 1929, the Burnham Chemical Company, by G. B. Burnham, its president, caused to be prepared and delivered to its stockholders, on the stationery of the said Burn-

ham Chemical Company, a letter which stated, among other things, the following:

“Some very important developments in the borax market have been taking place in recent months which have vital significance, in spite of the fact that the apparent motives back of them are being carefully camouflaged. For the past 100 years, in fact during its entire history, the price of borax has never been below \$75.00 per ton delivered. It is rather a peculiar coincidence that last summer just at the time we were getting ready to produce and put our product on the market, the price dropped to \$50.00 per ton delivered. Taking into consideration the fact that the freight charge is fixed, this means cutting the price of borax at the plant almost in half. It means that we can not make any profit on our borax at this early stage of development. We will be doing well to break even on our operating expense.”

The said letter further stated:

“It has been urged by some who are familiar with the situation that in selling borax at \$50.00 per ton our competitor is selling below actual cost of production, if correctly computed: and that this remarkable cut in the price of borax is nothing but a price war to destroy competition, and particularly the competition of young competitors who are struggling to become established. This matter has been under consideration for some time, and for obvious reasons,

the subject was kept confidential while it was under investigation. That is the reason why this price war has not been mentioned to you until the present time; and, for the same general reason further discussion of it will not be indulged in at this time, except to say that if our competitor has been selling borax for less than cost, it is believed that this fact will increase the wrongs imposed upon us, and therefore will increase the legal remedies available to us.”

That attached hereto as Exhibit 1 is a true, complete and exact photostatic copy of the entire letter dated the said January 12, 1929.

2. That under date of March 25, 1929, the Burnham Chemical Company, by G. B. Burnham, its president, W. A. DeWitt, its vice president and C. W. Whitney, its secretary and treasurer, caused to be prepared and delivered to certain of its stockholders a letter which stated, among other things, the following:

“But just as we went into production came the slash in the price of borax. The price dropped to the lowest level in the history of borax production. A drop of more than 50 per cent in the price of borax at this plant. The market became demoralized, and today there is almost no such thing as a definite borax price. There are as many prices as there are purchasers. We believe no one is really making a



profit and for this reason we expect conditions soon to change to normal, but the fight is still on. Your company, an infant in the industry without definitely established markets, without surplus or reserve, was hit the hardest. The [102] solid ground was taken out from under our feet. Our funds were soon exhausted and tied up in finished product. It is hard to move borax fast under existing conditions without great sacrifices.”

The letter further stated:

“Let us take stock of our resources. What have we? On close checking we believe that we have quite a lot. True enough not much to put on the market for a quick sale, under the conditions, but a big thing if properly developed. Of course, the raw material is there—no one doubts that. Our processes are sound and economical—that has been proven to the dissatisfaction and disappointment of our adversaries. Our borax plant is complete and in splendid condition. Our organization is capable, progressive, loyal and energetic. Our processes, which we believe to be the most valuable on Searles Lake, are legally protected by United States Letters of Patents. Our development work for the recovery of salts other than borax is progressing rapidly and satisfactorily. What is wrong then? Nothing fundamentally, except that some sinister forces apparently are trying

to rob us of what is rightfully ours. They know our weak point (lack of surplus and reserve) and they are trying to take advantage of it. Well, what is your management to do about such things? There is no way that we can see but fight for the protection of our rights and interests.”

Attached hereto as Exhibit 2 is a true, complete and exact photostatic copy of the entire letter dated the said March 25, 1929.

3. That during the month of March, 1930, the Burnham Chemical Company caused to be published and delivered to its stockholders Volume 1, No. 17, of the Burnham Chemical Company's paper entitled “Burnham Crystals”. That on page one of said publication under the heading “Plans For Future Production” appeared the following statement:

“Our two main competitors in borax, one at Searles Lake, and the other at Kramer, California, make about 90 per cent of the [103] world's borax. These two companies together completely control the borax price.”

That the aforesaid statement refers to the American Potash & Chemical Company, whose plant is located at Searles Lake, and the Pacific Coast Borax Company, one of whose mines is located at Kramer, California.

Attached hereto as Exhibit 3 is a true, complete

and exact photostatic copy of the issue of "Burnham Crystals" Volume I, No. 17, dated March, 1930.

PHILIP M. AITKEN.

Subscribed and sworn to before me this 4th day of February, 1946.

[Seal] MARY M. MULGRUE,

Notary Public in and for Lancaster County, State of Nebraska.

My commission expires the 30th day of October, 1947.

(Here follows Exhibit 1, identical with Defendants' Ex. M; Exhibit 2, identical with Defendants' Ex. N; Exhibit 3, identical with Defendants' Ex. AF.)

[Endorsed]: Filed February 7, 1946 [104]

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[Title of District Court and Cause]

AFFIDAVIT OF GEORGE B. BURNHAM IN  
BEHALF OF PLAINTIFF AND IN REPLY  
TO AFFIDAVITS FILED BY DEFEND-  
ANTS IN SUPPORT OF THEIR MOTIONS  
FOR SUMMARY JUDGMENT AND TO  
DISMISS AND TO STRIKE OUT

United States of America,  
Northern District of California,  
City and County of San Francisco—ss.

George B. Burnham, being first duly sworn, deposes and says:

That he is now and at all of the times herein set



forth has been President of Burnham Chemical Company, the plaintiff above named;

That he has read the affidavits of Moses E. Lasky filed herein and to which is attached a photostatic copy of the complaint of Burnham Chemical Company, et al, vs. George F. Smith, Postmaster of the United States in charge of the Post Office at Reno, Nevada, together with a photostatic copy of the Affidavit filed by affiant in said proceeding and together with certain other documents referred to in said affidavit of Moses Lasky; that said complaint in said action was filed on or about the 9th day of April, 1926; that the said affidavit of affiant was filed in said action on or about the 14th day of January, 1930; that it will be noted in said affidavit, paragraph one thereof, that affiant refers specifically to certain paragraphs of said complaint which he knew to be true of his own knowledge, but in this respect made no affirmations as to certain other paragraphs of said complaint, to-wit: Particularly subdivision "k" and all other subdivisions, except (c), (d), (e), (f), (g), (h) and (j) of Paragraph VIII; also, none of the allegations of said Paragraph VIII made upon information or belief was affirmed or confirmed [105] by affiant in said affidavit; also Paragraph IX, entitled "Defamatory Propaganda by Borax Trust against Burnham Chemical Company and Burnham Solar Process"; that in said Paragraph IX of said complaint certain allegations are made indicating conspiracies and combinations of certain of the defendants to injure plaintiff, all of which are omitted from the allega-

tions of said affidavit of January 14, 1930; Paragraph X, entitled "False and Misleading 'Report' by Dr. Andrew Stewart Concerning Investigation by U. S. Bureau of Mines"; Paragraphs XIII to XXVII, inclusive, and paragraph XXIX; that some portions of said paragraphs refer generally to said alleged conspiracies and combinations believed by affiant and said plaintiff, at the time of the filing of said complaint, to have existed but all of which allegations were omitted in the said affidavit of January 14, 1930 of affiant for the following reasons, to-wit: that between the date of the filing of said complaint, namely April 9, 1926, and the filing of said affidavit on January 14, 1930 affiant, as is more particularly hereinafter set forth, devoted a great portion of his time and attention in an endeavor to develop facts of said alleged conspiracies and combinations and to determine whether or not his suspicions that said defendants had conspired and combined in violation of the provisions of U.S. C.A. Sections 1 and 2, Title 15, were warranted, but between the time of the filing of said complaint and said affidavit affiant had not been able to secure or obtain any proof of the formation of such conspiracies or combinations, with the result that when it came to file said affidavit the suspicions of plaintiff as to the formation of such combinations and conspiracies had been lulled, due to representations and statements made to him by certain officers of defendants, particularly those of C. B. [106] Zabriskie, as alleged in Paragraph 75 of the complaint on file

herein, and also as a result of certain other investigations which affiant had made and more particularly hereinafter set forth, including, but not exclusively, his interviews with Department of Interior officials and Department of Justice officials and statements made by an attorney for United States Borax Company on a hearing had during the said interval in a proceeding in Los Angeles, likewise hereinafter referred to;

For the reasons above set forth affiant omitted in his said affidavit references to those paragraphs in said complaint so as aforesaid filed in the Fraud Order case and which embraces charges of conspiracies and combinations in violations of said Sections 1 and 2 of Title 15;

That the references in said complaint and said affidavit to "Borax Trust" did not have reference to violations of such Sections 1 and 2 of Title 15, but were used in the general popular use of the word "trust", as applied to those parties dominating an industry and such words were used in such popular sense and not in the technical sense of a cartel or trust or combination or monopoly in violation of said Sections 1 and 2 of Title 15; that it was not until after the Federal Government had filed its indictment and complaint in the United States District Court, in the fall of 1944, in and for the Northern District of California, and referred to in the complaint on file herein, that affiant or plaintiff herein had any definite knowledge or proof or concrete indication that defendants charged in the com-



plaint on file herein had formed such conspiracies and combinations prohibited by said Sections 1 and 2 of Title 15; that affiant and said plaintiff knew that at all of said time, up to the [107] filing of said Government indictment and complaint, that injuries were being suffered by plaintiff herein and that defendants, or some of them, named herein, were apparently the cause of such injuries; plaintiff herein and affiant had been advised, and had come to believe, that said injuries and damages were the result of the active and normal competition of defendants with plaintiff but at no time prior to the filing of said Government indictment and complaint did plaintiff or affiant have any proof or any knowledge of any kind, nature or description whatsoever, as to the combinations and monopolies formed and created by defendants herein in violation of said Sections 1 and 2 of Title 15; that affiant at all times after his suspicions were aroused as to the activities of said defendants, endeavored to the best of his ability to discover and ascertain whether or not such activities and such injuries and damages so caused plaintiff were the result of violations by defendants of said Sections 1 and 2 of Title 15 but as aforesaid was unable, although he diligently sought for the same, to obtain proof or evidence of such violations until, as aforesaid, the Federal Government took action as hereinabove set forth in the fall of the year 1944.

That the following is a statement of the activities of plaintiff and affiant in an endeavor to ascertain

whether defendants herein named were guilty of the violation of said Sections 1 and 2 of Title 15, to-wit:

(a) Post Office Fraud Order

June 20, 1925: On or about June 20, 1925, a Post Office fraud order was issued against plaintiff and affiant, as its President. Mail addressed to plaintiff at Reno, Nevada, was returned to sender by the Postmaster at Reno and marked "Fraudulent. Mail to this address returned by order [108] of Postmaster General". Affiant became suspicious that the fraud order might have been caused by defendants, or some of them. The only argument affiant had that would lead to such a suspicion was that, in affiant's opinion, the said plaintiff had done nothing fraudulent, in spite of the charges made by the Post Office Department, none of which charges was true. Defendants, or certain of them, were at said times competitors of plaintiff and would be the only ones to benefit by a fraud order against said plaintiff. Therefore, perhaps defendants, or some of them, caused the fraud order. However, affiant had no way of proving it even if it were true.

(b) Amended Complaint in Post Office  
Fraud Order

April 6, 1926: The said plaintiff filed its amended complaint on April 6, 1926, against the Postmaster at Reno in said fraud order case. In said amended complaint, and particularly in Paragraph IX., page 18 thereof, plaintiff claimed that certain "Defamatory Propaganda by Borax Trust against Burnham

Chemical Company and Burnham Solar Process” influenced Dr. Andrew Stewart to make his derogatory “report” against said plaintiff which caused the Post Office fraud order. However, said plaintiff had no proof at said time that Dr. Andrew Stewart was influenced directly or indirectly, by said defendants or any one of them, or that said defamatory propaganda was caused by said defendants, or any one of them. Said plaintiff based its charges largely upon hearsay and upon the grounds that said plaintiff had done nothing fraudulent; that said defendants, or some of them, would be the only ones to gain by the fraud order issued against plaintiff; and therefore, said defendants, or one of them, probably caused the Post Office fraud order to be issued, and while said plaintiff subsequently gained information tending to prove said allegations to be correct, yet said plaintiff at said time had no [109] proof that said defendants, or any one of them, caused the fraud order.

(c) Statement by a Government Official

October 8, 1926: The President of Defendant Sterling Borax Company, and who was at the same time a highly placed Federal Government official and formerly had been, prior to his appointment to such a position, the Chicago Manager and representative of Defendant Pacific Coast Borax Company, stated on October 8, 1926 that he was responsible, in a measure, for having said fraud order issued against plaintiff. On several occasions thereafter, said plaintiff and said plaintiff’s attorney, and also affiant, endeavored to determine if said President of



Defendant Sterling Borax Company was responsible for having the fraud order issued because of his official government position, or because he wanted to benefit defendants, or any one of them, but all of said endeavors were of no avail. Said endeavors were made by personal interviews, or in other ways, and were made during the month of March, 1927, and the months of January and February, 1929, and again in the month of May, 1929.

(d) Cut in the Price of Borax

June, 1928: Said plaintiff started its commercial borax production in June, 1928, and the price of borax was cut by certain defendants herein from about \$60.00 a ton to about \$30.00 a ton in bags f.o.b. Searles Lake, during that first month of plaintiff's operations. Affiant's suspicions were aroused and affiant thought that perhaps the price cut was deliberately aimed at plaintiff to drive it out of business. Thereupon plaintiff consulted its attorneys, Francis J. Heney and B. D. Townsend, and asked them to express an opinion on the matter.

In order to secure additional legal opinion on the subject, Mr. Townsend wrote, on July 26, 1928, to his [110] friend H. Stanley Henricks, of the law firm of Bright, Thompson and Henricks in Washington, D. C. He inquired in regard to certain questions of law and to obtain his opinion as to whether any anti-trust law was being violated in the borax business. Affiant is informed and believes that Mr. Henrick's reply was, in effect that it would be diffi-

cult to prove even if it were true, because the controlling office of the two largest borax producers was in London.

(e) Conference with Townsend and Westend  
Chemical Company

August, 1928: The price of borax continued to fall below \$30.00 a ton in bags, f.o.b. Searles Lake, after June, 1928, and reached a price of about \$18.50 a ton in bags, f.o.b. Searles Lake, by the spring of 1929—this price in bulk would be about \$16.00 per ton f.o.b. Searles Lake. An official of the Westend Chemical Company, a small producer of borax at Searles Lake, conferred with officials of plaintiff in August, 1928, to see what could be done to remedy the situation as the price of borax was continually going down. Said company and said plaintiff jointly conferred with Mr. B. D. Townsend on the matter and jointly employed Mr. Townsend to render an opinion. Mr. Townsend made an "examination of authorities and rendition of opinion pertaining to certain practices in the borax and potash trade and legal remedies available under the Federal Trade Commission, or otherwise." Mr. Townsend and the officials of the Westend Chemical Company, and the officials of said plaintiff discussed the matter from all angles. The Westend Chemical Company officials concluded there was no proof available that any anti-trust law was being violated and that the drastic cut in the price of borax was the natural result of the laws of supply and demand. There

was a [111] surplus of borax on the market and naturally the price of borax went down. Mr. Townsend admitted that he saw no way to prove any violation of the law.

(f) Mr. Townsend and Affiant Confer with the  
Department of Justice

April, 1929: Mr. B. D. Townsend had formerly been employed by the Department of Justice in prosecuting several important legal matters for the Government and he had many friends in the Department. Affiant suggested that he confer with the Department of Justice to see if it had any suggestions, or any information that would support a charge of any violation of the Anti-trust laws by the defendants, or any one of them. Thereupon, Mr. Townsend and affiant went to Washington, D. C. in April, 1929, and called upon the Department of Justice in regard to the matter. Mr. Townsend had several conferences and the results of the conferences were that, since both the defendant American Potash and Chemical Corporation and the defendant Pacific Borax Company, were owned and controlled by foreign interests, it would be impossible to determine if there was any conspiracy between them to squeeze out competition by staging a price war.

(g) Affiant's Talk with Mr. Zabriskie  
and Mr. Emlaw

May 17, 1929: Affiant called upon Mr. Chris B. Zabriskie, Vice-president and General Manager of defendant Pacific Coast Borax Company, at his



office in New York City on May 17, 1929, and accused him of cutting the price of borax to drive said plaintiff out of business in violation of the anti-trust laws. Mr. Zabriskie said that they were not trying to injure the Burnham Chemical Company and his company was not violating any anti-trust law. Mr. Zabriskie said they had a cheaper source of borax and the reduction in price was a matter of supply and demand. [112] The supply was greater than the demand and the price of borax had to go down. Mr. Zabriskie was very firm, persuasive and convincing in his statements, and affiant went away from his office believing that what he said was true.

Affiant also called upon Mr. H. S. Emlaw, General Manager of defendant American Potash and Chemical Corporation, at his office in New York City on May 17, 1929, and discussed with him the borax price situation. Mr. Emlaw confirmed the statement made by Mr. Zabriskie that there was a surplus of borax on the market and that they had difficulty in selling the large quantity of borax in their warehouse, and yet they had to sell it in order to make room for more borax that was being continually made as a by-product in their potash production and therefore the price of borax had to go down.

(h) Attorney of Defendant United States Borax Company Denies There was any Monopoly in Borax.

July 1, 1929: Mr. B. D. Townsend and affiant attended the hearing in Los Angeles before the

Register of the United States Land Office in regard to the validity of a certain mining location made by the defendant United States Borax Company, a subsidiary of defendant Borax Consolidated, Ltd.

In the course of cross-examination, on July 1, 1929, of Mr. C. M. Rasor, who was a witness for defendant United States Borax Company, Mr. Townsend sought to determine whether defendant United States Borax Company was an agent of a world monopoly of borax. The implication was heatedly denied by Mr. William E. Colby, attorney for defendant United States Borax Company. Mr. Colby stated substantially as follows:— “So far from seeking to create a monopoly of borax supply of the world, it always has been and now is the policy of the United States Borax Company to maintain competition in the [113] borax field.”

As a result of the statements by Mr. Zabriskie, Mr. Emlaw and Mr. Colby, said plaintiff and affiant concluded that there was no violation of said Sections 1 and 2 of Title 15, and said plaintiff and affiant thereby were lulled into inaction.

(i) Affidavit of G. B. Burnham in Post Office  
Fraud Order January 14, 1930

January 14, 1930: In connection with the said Post Office fraud order suit, which was about to come to trial in Carson City, Nevada, affiant filed an “Affidavit in Support of Motion for Temporary Injunction.” In the affidavit, affiant omitted all charges that there was any violation of Anti-trust laws by the Borax companies in view of what Mr.

Zabriskie and Mr. Emlaw had told affiant on May 17, 1929, and what the attorney, William E. Colby, had said on July 1, 1929, to the effect that defendants, Pacific Coast Borax Company and United States Borax Company were not violating any Anti-trust law and that, on the contrary, they were endeavoring to "maintain competition in the borax field."

(j) Burnham Chemical Company Continues  
Development of Its Lease

1929 to 1933: After plaintiff's borax plant was closed down in January, 1929, as described in plaintiff's complaint herein, plaintiff continued the development of its lease at Searles Lake for a number of years in the hopes that it could renew its borax production, and also in anticipation that it would acquire a sodium lease on the Little Placer Claim in the Kramer Borax District, 65 miles southwest of Searles Lake, and it thereby would be able to supply its borax refinery at Searles Lake with the cheap source of crude sodium borate known to be contained in the Little Placer Claim. Said plaintiff developed its [114] process for making potassium sulphate and common salt and it made 400 tons of common salt and sold most thereof. A description of what said plaintiff did is shown in the letters to the Secretary of the Interior and which were submitted by Mr. Moses Laskey in his affidavit of January 1946, in behalf of the defendants, or some of them.



(k) Pacific Coast Borax Company Sues American Potash and Chemical Corporation

1931 to 1932: Defendant Pacific Coast Borax Company sued defendant American Potash and Chemical Corporation for an infringement of its chemical process under United States Letters Patents, in United States District Court in Los Angeles, California, File P-115-J. A determined legal struggle was carried on and many patent attorneys employed. Affiant followed the case in a general way and understands the evidence and documents were extraordinary voluminous. The effect on the officers of plaintiff and particularly upon affiant was that the two major groups of defendants herein were entirely independent and that there was no collusion of any sort between them, or any conspiracy in violation of the Anti-trust laws, thus plaintiff was further lulled into inaction.

(l) Burnham Chemical Company Finally Denied Lease on the Little Placer Claim

May 19, 1933: The Department of the Interior, through its General Land Office at Los Angeles, California, finally denied plaintiff's application for a lease on the Little Placer Claim, which said plaintiff was counting on as a source of crude borax to renew operations of its borax factory at Searles Lake. Affiant felt so reasonably certain that plaintiff would obtain the Little Placer Claim that affiant's suspicions were again aroused when its application for the Little Placer Claim was denied. Affiant believed that probably defendants, or some of

them, were violating the Anti-trust laws because if Defendant United States Borax Company finally acquired patent to the Little Placer Claim it would tend to further increase its monopoly of sodium borate in the said Kramer District. [115]

For a further detailed statement of plaintiff's endeavors to secure a lease upon said Little Placer Claim, and of the opposition of certain of the defendants herein to said endeavors of plaintiff, affiant refers to and incorporates herein, as fully as though specifically set forth herein, Paragraph 77 to 80, inclusive, of said complaint of plaintiff on file herein; that since said judgment was rendered against said defendants, or some of them, in said Anti-Trust indictment and action by the District Court of the United States, in and for the Northern District of California, plaintiff continued its efforts to secure, and now has pending its application for, a lease on said Little Placer Claim.

(m) Conference with Mr. Louis Glavis

August, 1934: As a result of plaintiff's great disappointment in not securing a lease on the Little Placer Claim, which would have been its salvation and would have enabled it to renew the operation of its plant at Searles Lake, affiant decided to go to Washington, D. C., to discuss the matter with Government authorities there. Judge Francis J. Heney gave affiant a letter of introduction to Mr. Louis Glavis, Bureau of Investigation, Interior Department, Washington, D. C.

Upon arriving in Washington about August 19, 1934, affiant presented his letter of introduction to Mr. Louis J. Glavis and discussed with him and with Mr. B. W. McLaughlin, his assistant, the situation in the Kramer Borax District and the fact that said plaintiff did not get a lease on the Little Placer Claim. Affiant brought up the question of the legality of giving patent to the land to the United States Borax Company. Affiant also discussed the fact that that company was gradually monopolizing all of the borax deposits at Kramer. Affiant discussed the matter with several other men in the Department of the Interior.

Affiant's talk with Mr. McLaughlin, who was Mr. Glavis' assistant, was encouraging because affiant felt that he and Mr. Glavis looked at the situation from plaintiff's point of view. However, neither of them [116] could say anything definite because they would have to await a report from the Office of the Solicitor.

Nevertheless, affiant was sufficiently encouraged in the possibility that defendants, or some of them, were probably violating the sodium leasing act; that affiant wrote to the Secretary of the Interior his letters of September 21, 1934 and November 28, 1934, heretofore submitted in the affidavit of Mr. Moses Lasky, entitled "Further Affidavit of Moses Lasky in Support of Defendant's Motion to Dismiss and For a Summary Judgment," which letters practically charged defendants, or some of them, of fraudulently securing patents to the sodium borate deposits in the Kramer District be-



cause by obtaining ownership the defendants, or some of them, could create a monopoly; likewise, if they tried to lease the deposits under the sodium leasing act, they would be attempting to evade the law because they were all foreign owned companies and the leasing act definitely stated that "citizens of another country shall not, by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of the Act," meaning the general Leasing Act. A copy of affiant's September 21, 1934 letter was sent to Mr. Louis Glavis of the Office of Investigation.

In affiant's letter of November 28, 1934, affiant pleaded with the Secretary of the Interior not to cancel plaintiff's lease at Searles Lake because, as long as plaintiff held that lease, there was no monopoly on borax. Furthermore, plaintiff could produce borax immediately in the event borax prices increased, and therefore defendants would have no absolute monopoly on production.

(n) Nathan B. Margold's Letter to the Secretary of the Interior Dated July 22, 1935.

July 31, 1935: Mr. Harry Slattery, personal assistant to the Secretary of the Interior, wrote affiant a letter dated January 31, 1935. which was in effect the final answer to affiant's letters of September 21, 1934, and November 28, 1934, to the Secretary of the Interior hereinbefore mentioned. Mr. Slattery enclosed a mimeographed [117] copy of a letter written by Nathan B. Margold, Solicitor, to the Secretary of the Interior, dated July 22, 1935. Mr.

Margold had been asked to consider a memorandum from the Director of Investigations of the Department of the Interior regarding the legality of granting patents to certain sodium borate lands in the Kramer Borax District to defendant United States Borax Company. Mr. Margold stated in his letter that "Nothing is seen in the present record that would constitute sufficient evidence to seek to set aside the patent for fraud." Mr. Margold, the Solicitor, had studied the facts and the law on the subject thoroughly and so affiant concluded that defendants United States Borax Company, Pacific Coast Borax Company and Borax Consolidated, Ltd., had done nothing illegal under the leasing laws or anti-trust laws. If the Solicitor of the Department of the Interior, after his exhaustive search, found nothing illegal, then all affiant's suspicions that said defendants were violating the leasing laws and the Anti-trust laws were groundless. Thereupon affiant and the plaintiff herein, although their suspicions had been aroused, were again lulled into inaction.

#### (o) Plaintiff Continued Activities

1930-1937: The United States District Court in the District of Nevada, Carson City, Nevada, granted the plaintiff herein on February 3, 1930, a temporary injunction forbidding the Postmaster at Reno, Nevada, from carrying out the Post Office fraud order. The injunction was granted because the Court saw no evidence of fraud. Plaintiff thereupon began to receive its mail.

Shortly after the temporary injunction was granted, the attorney for the plaintiff, Mr. B. D. Townsend, had to go to a hospital for an operation, but it was planned to have another hearing in Court to ask that the temporary injunction be made permanent. The hearing was to be held just as soon as Mr. Townsend fully recovered from his illness.

Because of the temporary injunction and the fact that plaintiff could receive its mail, some of the stockholders were thereby encouraged to supply plaintiff with additional funds to continue [118] development of plaintiff's lease at Searles Lake. It was planned to recover potassium sulphate, sodium chloride, borax and other chemicals from the brine. By making several products, certain items in the cost of producing borax could be distributed over the cost of recovering other chemicals. In this way, the Company could continue operations even though the price of borax might be cut below \$18.00 a ton f.o.b. Searles Lake.

As a step in the further development of plaintiff's lease, during the years 1930 to 1933 inclusive, plaintiff carried on extensive experiments in the development of its process for producing potassium sulphate and it also built a semi-commercial plant for making common salt, and made 400 tons of such salt. Altogether, plaintiff spent \$49,048.59 from 1930 to 1933 inclusive, in the development of its deposits at Searles Lake. At the same time, plaintiff was counting heavily upon obtaining a lease on the Little Placer Claim to enable it to resume operations of its borax plant.



Nearly all of the potassium sulphate consumed in the United States was imported from Europe and plaintiff believed it should be entitled to a development loan from the Reconstruction Finance Corporation to build a potassium sulphate plant. It would be in the public interest to make the United States independent of a foreign supply of potassium sulphate because it is an important chemical fertilizer. Such production would be non-competitive in the United States because practically no one else in the United States was making potassium sulphate, and what little was made was in very limited quantities.

The Reconstruction Finance Corporation was authorized by Congress to make development loans for some non-competitive minerals, but the law did not provide for loans for potassium sulphate development, and which plaintiff believed was an oversight by Congress. Plaintiff's stockholders residing in Philadelphia, Pennsylvania, explained the situation to the Honorable M. J. Stack, a Member of the House of Representatives from Philadelphia. Thereupon, Mr. Stack introduced House Bill H. R. 6188 in the House of Representatives on February 26, 1935. [119] The title of the Bill was "To Authorize the Reconstruction Finance Corporation to Make Loans to Aid in the Development of the Recovery of Potassium Salts and Other Minerals."

For about two years considerable effort was made to get the bill passed, but without success, and affiant, and particularly the Philadelphia stockholders, became suspicious that its failure to pass was due to the influence of the defendants herein, or some of

them. Furthermore, plaintiff was about to lose its lease at Searles Lake for non-payment of rent and so the Philadelphia stockholders decided to continue their effort to help plaintiff by appealing to Congress for assistance, because all other appeals to the Department of the Interior had failed.

In addition, between 1928 and 1935, affiant held many conferences with plaintiff's attorney, Mr. B. D. Townsend, at times when his health seemed slightly improved, in regard to the question as to whether or not plaintiff had sufficient proof to bring a cause of action against defendants, or any of them, under the Anti-trust laws. Mr. Townsend stated the law on these occasions and explained that as long as there was genuine competition between the competitors there was no cause of action, but if there was an agreement between the competitors, or if for example one person or one company controlled both defendant American Potash and Chemical Corporation and defendant Borax Consolidated, Ltd., then there would be a monopoly since they would be under one single control.

On one particular occasion, about 1934, Mr. Townsend suggested that affiant investigate to see if some one company, such as the Goldfield Consolidated of South Africa, controlled both defendant American Potash and Chemical Corporation and defendant Borax Consolidated Ltd., affiant searched continuously for some such connection or agreement between such companies but was never able to find any such single control or agreement until the Government brought its action against defendants, or some of them, in the Fall of 1944. [120]

## (p) The Philadelphia Resolutions

July 17, 1937: The stockholders of plaintiff, and particularly those stockholders residing in Philadelphia, Pennsylvania, could not understand why the Government would grant most of the potash and borax deposits in the United States to foreign owned interests and yet proceed to take away the deposits held by plaintiff at Searles Lake, upon which plaintiff, with the aid of its 7,000 United States Citizens, had spent \$1,168,564 in development, and which represented an investment of about \$1,500,000.00 by those American Citizens.

Therefore, a meeting of the Philadelphia stockholders of plaintiff was held in Philadelphia, Pennsylvania, on June 17, 1937 and at that meeting affiant explained to the stockholders the very unfortunate situation of plaintiff. Affiant explained that plaintiff was about to lose its Government lease at Searles Lake, due to non-payment of rent, and under the terms of the lease, if the rent was not paid, the lease could be cancelled, and affiant recommended that the stockholders take some definite action to either raise the money to pay the lease rent or appeal to the Government not to cancel the lease, or continue with their efforts to get the Government to render plaintiff financial aid.

The Philadelphia stockholders thoroughly discussed the situation from all angles and finally passed resolutions urging the Government not to cancel the potash lease of plaintiff at Searles Lake, California, which would result in the loss of about \$1,500,000.00 investment of the stockholders, and



which investment in Government property was made in good faith. The resolutions also asked the Government for a lease on some of the known borate deposits at Kramer, California, (such as the Little Placer Claim), and financial aid to enable plaintiff to get into large scale production of all the various salts at Searles Lake, as well as at Kramer, and thereby compete with foreign owned interests that were monopolizing the potash and borax deposits of the United States. The resolutions pointed out the injustice of the Post Office fraud order against the plaintiff herein and implored the Government to render a helping hand to the 7,000 citizens of the United States who were the stockholders of plaintiff. [121]

The Philadelphia Resolutions also pointed out that under the Sodium Leasing Act of February 25, 1920, all prospectors on the public domain were charged with notice that they could not lawfully seek or mine for sodium borate under the guise of a mineral location; that in August, 1925, the largest deposit of sodium borate in the world was discovered at Kramer, California; that a "foreign owned borax trust" had acquired outright ownership to the deposits, but if the Government had granted plaintiff a lease on certain of the known sodium borate lands at Kramer soon after plaintiff had made its application for a lease on the same, plaintiff would have been a successful enterprise.

The Philadelphia stockholders questioned the legality of the foreign owned interests monopolizing the potash and borax of the United States. In fact,

the resolutions strongly denounced the actions of the Government in permitting foreign owned interests to acquire so much of the nation's valuable potash and borax deposits.

A copy of the resolutions, with a letter, was sent to the President of the United States on June 22, 1937, to the Secretary of the Interior, to certain Members of Congress, and to other Government Officials.

(q) The Commissioner of the General Land Office Answers the Philadelphia Resolutions.

July 2, 1937: The Commissioner of the General Land Office wrote a letter to Mr. Frank B. Stockley, an attorney and Chairman of the Philadelphia stockholders of plaintiff, and stated, among other things, the following:

“Some reference was made in the resolutions to the general policy of the Government toward the potash industry and as to sodium, borax and similar products. In this connection, it may be noted that the United States Senate in 1936 authorized its Committee on Public Lands and Surveys to make an investigation concerning the potash industry, which investigation has not yet been completed. The views of this Department relative to sodium, borax and similar mineral products are set forth in the decision found in I. D. Volume 54, page 183, case of *Burnham Chemical Company vs. United States Borax Company and Western Borax Company; United States Intervener.*” [122]

The decision found in I. D. Volume 54, page 183, upholds the actions of the United States Borax Company and the Western Borax Company in their acquisition of the sodium borate deposits at Kramer and denied plaintiff's application to a lease on the Little Placer Claim.

In other words, as late as July 2, 1937, the General Land Office saw nothing illegal in all that had been done at Kramer and all the stockholders' suspicions that the borax people were violating the Anti-trust laws were groundless.

#### (r) The New York Resolutions

August 9, 1937: A meeting of the New York stockholders of plaintiff was held on August 9, 1937, and affiant discussed with them all the injustices that plaintiff had suffered and the fact that plaintiff was about to lose its potash lease and borax plant at Searles Lake. Affiant told them of the resolutions that the Philadelphia stockholders had just passed and affiant showed them the July 2, 1937 letter received from the Commissioner of the General Land Office. Affiant explained to them all the angles to the situation and urged that they raise funds to pay the lease rent so that plaintiff's lease would not be cancelled, or else take some other steps to save the situation. After thoroughly discussing the matter, the New York stockholders decided to pass resolutions similar to those of the Philadelphia stockholders, but to bring out certain points that would, in a way, be an answer to the Commissioner's letter of July 2, 1937.



Copies of the resolutions were sent to the Potash Investigating Committee of the United States, to the Secretary of the Interior and to other Government officials, but all to no avail.

The stockholders of plaintiff tried their best to show the Government all the wrong that had been done to plaintiff, but instead of getting the Government to lend them a helping hand, the Post Office fraud order was reinstated against plaintiff the very next month, in September, 1937. Incidentally, prior thereto said action of plaintiff [123] pending at Carson City, Nevada, in which plaintiff had obtained an injunction against said fraud order, ex-parte, and without notice to plaintiff of any hearing thereon, was dismissed.

Affiant concluded that the activity of its stockholders and itself was making the Government angry and making the situation worse instead of better; The Philadelphia and New York resolutions vigorously denounced the Department of the Interior on the grounds that it was helping foreign owned interests to build up a vast monopoly of potash and borax in the United States. The resolutions implied that such a monopoly would be in violation of the Anti-trust laws, although they did not definitely say so.

The reinstatement of the Post Office fraud order was a "slap in the face" at 7,000 United States Citizens: It meant that the Government was right and the stockholders were wrong.

Affiant therefore reluctantly concluded that there must be no illegal monopoly (or if there was it was

impossible for plaintiff or affiant to obtain evidence thereof) and everything that had been done by defendants, or some of them, and by the Department of the Interior was perfectly legal.

(s) Plaintiff Makes Final Appeal to Raise  
Money to Pay Lease Rent

September 3, 1937: Plaintiff sent a letter on September 3, 1937, to all its stockholders making a final appeal to raise money to pay its lease rent at Searles Lake and plaintiff enclosed a copy of the Philadelphia Stockholders resolutions. This was prior to the reinstatement of the Post Office fraud order.

During the latter part of September, 1937, the exact date not being known, the Post Office fraud order against plaintiff was reinstated as aforesaid.

Plaintiff was not consulted regarding the reinstatement of the fraud order. There was no warning or even any hint that the fraud order would be reinstated. There was no false statement in plaintiff's letter, or in the resolutions that plaintiff knew of. Every statement was truthful. The reinstatement of the fraud order was a terrific blow to plaintiff, who was struggling to survive. [124]

Plaintiff, as well as affiant, as aforesaid, concluded finally that the Government did not like the continual harping on the question as to whether or not it was legal for foreign-owned interests to monopolize nearly all the potash and borax in this country. The inference plaintiff gathered was that such a monopoly was legal because the Government

upheld everything that was done and plaintiff was a fraud for questioning the matter. Plaintiff was thereupon again lulled into inaction.

(t) The Conference With Mr. H. S. Emlaw  
and F. C. Baker

October 19, 1937: Affiant conferred with Mr. H. S. Emlaw and Mr. F. C. Baker, officials of defendant American Potash and Chemical Corporation, in their office in New York City, to see if they would be interested in financing plaintiff's potash lease at Searles Lake, or drill for borax on plaintiff's prospecting permit on lands near Kramer. However, they were not interested. They stated that when their company obtained its patented land at Searles Lake from the Government (about the year 1918) it agreed with the Government that it would not finance, or make any deal with any other lessee at Searles Lake, or with anyone else, that would establish, or tend to establish, a monopoly.

They stated to affiant that the Goldfields Consolidated of South Africa (an English corporation) or its affiliated interests, and other English people, held 80% interest in defendant American Potash and Chemical Corporation. They also stated that there was no connection between their company and the Pacific Coast Borax Company or the Borax Consolidated, Ltd., of London; in the fall of 1942 affiant for the first time learned that such statements as to ownership by said English corporation were false; in the fall of 1944 affiant likewise



learned that the rest of said statements were false, but at the time of the making of said statements affiant believed them and was further lulled into inaction. [125]

(u) Cancellation of Plaintiff's Lease

January 31, 1938: Plaintiff's lease at Searles Lake was cancelled, stay of judgment expired and plaintiff lost all its assets at Searles Lake.

(v) Talk With Mr. Bradshaw:

November 17, 1939: Affiant had heard that American Potash & Chemical Corporation had made an application for a lease on the deposits at Searles Lake, formerly held by plaintiff. Affiant thereupon went to Washington, D. C., and talked with Mr. Bradshaw, Chief of Division N, United States Land Office, Department of the Interior. Mr. Bradshaw looked after mineral applications. Affiant talked with him relative to the application of American Potash & Chemical Corporation for a lease on additional Searles Lake Land. Said corporation put in a bid not only for the deposits formerly held by plaintiff but for additional lands as well, making a total of about 6,000 acres. Affiant stated that if the Government granted a lease to such corporation that already had much of Searles Lake deposits, it would aid in building up a monopoly in potash and borax in the United States; that American Potash & Chemical Corporation was an English owned company (which affiant thought at that time was the case, whereas, it was German

owned), that that Pacific Coast Borax Company was also an English owned company, it being a subsidiary of the Borax Consolidated, Ltd.; that these companies had their controlling offices in London and that they produced much of the potash and borax in the United States. Affiant said that perhaps there was an understanding between such companies to fix the price of potash and borax, and that perhaps after all, they were in collusion since they both had their head offices in London. Affiant pointed out that the leasing law prevented granting any lease to anyone who was violating any Anti-trust law.

To this, Mr. Bradshaw quickly replied that defendant American Potash and Chemical Corporation and defendant Borax Consolidated, Ltd., were absolutely separate and there was no connection between them. He said it with a tone of authority, so affiant concluded [126] that he had positive knowledge on the subject. Affiant decided that his own conjecture was wrong and therefore that there was no connection between the two companies, and there was no conspiracy or monopoly in violation of the Anti-trust laws.

(w) Affiant Again Confers With the  
Department of Justice

November 17, 1939: Affiant conferred with Mr. Wendell Berge of the Department of Justice at his office in Washington, D. C., on November 17, 1939, and discussed with him the investigation that the Department was at that time making concerning

the alleged violation of the Anti-trust laws by the Fertilizer Industries. Affiant explained that potash was an important fertilizer and that one large producer of potash, namely defendant American Potash and Chemical Corporation, also produced borax and was controlled by English interests, and another large producer of potash, namely the United States Potash Company, was controlled by defendant Borax Consolidated, Ltd., which was also another English owned company. Therefore, affiant stated that the English owned borax producers had an influence on the price of potash.

Mr. Berge said that because the controlling interests of the two major borax producers were outside of the United States it was difficult to obtain proof of any violation of Anti-trust laws.

Affiant explained the history of plaintiff to Mr. Berge and discussed the drastic cut in the price of borax that occurred the month plaintiff started its commercial borax production. Affiant also gave Mr. Berge a copy of the letter written by plaintiff's attorney, Mr. B. D. Townsend, to Mr. H. S. Henricks, dated July 26, 1928, and heretofore mentioned in subdivision (d) hereof, and also other data and information concerning the borax industry which might be useful in determining whether there was any violation of anti-trust laws.

Mr. Berge stated they would give the matter consideration and asked me to write to them briefly on the subject discussed. He suggested that I address the letter to Mr. Thurman W. Arnold, Assistant Attorney General, but direct to his attention.



Whereupon [127] affiant confirmed the conversation in a letter dated November 22, 1939, to Mr. Thurman W. Arnold.

(x) The Protest Against Leasing Searles Lake Lands to Defendant American Potash and Chemical Corporation.

November 18, 1939: The revised potash leasing act, approved February 7, 1927, and entitled: "An Act to Promote the Mining of Potash on the Public Domain" (Public No. 579 - 69th Congress), states, under Section 5, that the provisions of Section 1 and 26 to 38 inclusive of the General Leasing Act of February 25, 1920 (Public No. 146-41 Stat. 437) are made applicable to include potassium.

Under Section 27 of the General Leasing Law it states: "That if any of the lands or deposits leased under the provisions of this act shall be . . . possessed or controlled . . . in any manner whatsoever, so that they form a part of, or are in any wise controlled by any combination in the form of an unlawful trust . . . or any agreement or understanding, written, verbal or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof . . . the lease thereof shall be forfeited by appropriate court proceedings."

A similar restriction regarding monopoly is provided in Section 30. Affiant learned that during 1939 Defendant American Potash and Chemical Corporation and other fertilizer companies were being investigated by the Anti-Trust Division of

the Department of Justice for alleged violation of the Sherman Anti-Trust Act. Defendant American Potash and Chemical Corporation also had entered a bid for a lease on about 6,000 acres of potash and borax land at Searles Lake on October 19, 1939 in spite of the investigation being made on it for violation of the anti-trust laws.

On November 18, 1939, affiant protested to the Secretary of the Interior against the granting of any such lease, or leases, to said Defendant American Potash and Chemical Corporation, because it already held 3,319 acres of the Searles Lake deposit, and because of the very fact that an investigation was then, at that time, being made of said defendant's alleged violation of the Anti-Trust Law. [128]

(y) Department of Justice Asked for  
Documentary Evidence

December 8, 1939: Mr. Charles C. Pearce, Special Assistant to the Attorney General, Department of Justice in New York City, wrote to affiant for documentary evidence which might be in affiant's possession sustaining the views expressed in affiant's letter of November 22, 1939, and thereupon affiant gave the Department of Justice additional information. On December 18, 1939, January 5, 1940, and January 30, 1940, affiant wrote letters to the Department of Justice and, subsequent thereto, other officers of plaintiff gave the Department of Justice additional information.

(z) Affiant Asks Department of Justice  
for Assistance

December 18, 1939: Affiant wrote on December 18, 1939, to Charles C. Pearce, of the Department of Justice, who was conducting the investigation of the Fertilizer Industries, and explained that if plaintiff could get into potash production at Searles Lake and develop the solar process for making potash as is being done on the Dead Sea in Palestine, affiant believed that it would afford a cheap source of potash for the American farmer, and affiant stated that the Government should help plaintiff develop its solar process for producing potash and chemicals from Searles Lake brine.

(a-a) Department of Interior Found No  
Violation of Anti-Trust Laws

March 5, 1940: On March 5, 1940, the Commissioner of the General Land Office answered affiant's letter of November 18, 1939 and stated among other things that: "The American Potash and Chemical Corporation was found qualified under the law to take and hold potash leases on the public domain." A lease on the 6,000 acres of potash and borax land at Searles Lake was thereafter granted to Defendant American Potash and Chemical Corporation. Affiant, therefore, was led to believe that there was no unlawful trust or monopoly in the potash or in the borax [129] business and therefore there was no conspiracy against plaintiff because, under the potash leasing law, the Department of the Interior could not grant a potash lease, if any



conspiracy or monopoly did exist in violation of the law. Certainly, if the Department of the Interior could find no violation of the Ant-Trust Laws, then affiant and plaintiff had no grounds for believing that any such violations existed and, as a result thereof, neither plaintiff nor affiant learned or attained any information to the contrary until the fall of 1944 when the Federal government filed its said indictment and complaint in the United States District Court, in and for the Northern District of California.

(b-b) Further Endeavors of Affiant to Discover  
Facts of Anti-Trust Law Violations

1940-44: From March, 1940 to the fall of 1944, affiant continued to search for any information that would indicate that defendants, or some of them, had violated or were violating the Anti-Trust Laws but, in spite of such efforts, could not discover any evidence warranting a charge of violation of such Anti-Trust Laws.

However, during the month of October, 1942, affiant learned that the Alien Property Custodian had seized 90% of the capital stock of Defendant American Potash & Chemical Corporation by reason of the fact that said Custodian had ascertained that such stock was owned by citizens of Germany; at the same time, affiant ascertained that said German citizens had secured said stock in 1929 from British interests. This was the first knowledge that plaintiff or affiant had that the controlling interests of Defendant American Potash & Chemical Corporation and Defendant Borax Consolidated, Ltd.,

were owned by citizens of different nations. By reason of said information, affiant became further convinced and believed that there was no connection between said defendants nor was there likely to be any agreement between them in violation of the Anti-Trust Laws; that affiant had [130] no knowledge or information or means of knowledge or information that said German citizens had joined with said British interests in the formation of the Borax Cartel disclosed by the said Federal government when it filed its said indictment and said action on September 14, 1944 against said defendants, or most of them, in the United States District Court, in and for the Northern District of California, as has been hereinabove set forth. [131]

As to the Affidavit of J. C. Lynch

Affiant has read the affidavit of J. C. Lynch filed herein. The prices for borax as shown therein are generally, but not always, lower than the prices shown in the trade magazines for the same periods of time. Affiant has read many articles on borax and made a record of many price quotations on borax as shown in chemical magazines. The Burnham Chemical Company was in direct communication with buyers of borax during the years from 1924 to 1929 and occasionally thereafter. Information on prices prior to that time was gathered from reliable sources and is believed to be correct, and affiant therefore alleges that in the year 1874 the price of refined borax was \$130.00 per ton delivered, eastern territory. The delivered price temporarily advanced to \$220.00 and \$260.00 per ton, but de-

clined again. Prices from 1885 to 1900 fluctuated within the range of \$120.00 to \$160.00 per ton delivered. The price subsequently declined slowly to \$75.00 per ton in 1914. During and following World War I, the prices advanced and then declined as follows:

1914		\$ 75.00 per ton delivered Eastern territory
1915	\$ 85.00 to	125.00 per ton delivered Eastern territory
1916	125.00 to	135.00 per ton delivered Eastern territory
1917	135.00 to	140.00 per ton delivered Eastern territory
1918	140.00 to	145.00 per ton delivered Eastern territory
1919	145.00 to	165.00 per ton delivered Eastern territory
1920	165.00 to	155.00 per ton delivered Eastern territory
1921	155.00 to	105.00 per ton delivered Eastern territory

Prices previously shown herein and also those shown in affidavit by J. C. Lynch are prices delivered eastern territory in barrels or bags. The price in bulk at the plant is therefore affected by varying freight rates and cost of packaging. During the period when plaintiff sold [132] its borax in 1928, 1929 and 1930, the freight to New York and other eastern points was \$19.50 per ton in car lots of 80,000 pounds; July 1, 1930, through freight by rail to Galveston, and boat to New York was \$15.00 per ton, and the all rail rate to eastern points was reduced December 1, 1930 to \$16.00 per ton.

All borax produced and delivered to eastern and foreign markets by plaintiff in 1928 and 1929 was packed in burlap bags with either cotton or paper linings. Burlap bags with cotton lining cost approximately \$6.00 per ton. Affiant was informed and believes that in 1928 American Potash & Chemical Corporation started packing borax in double paper bags and plaintiff contemplated using similar bags



had it resumed operations after closing down the plant in January, 1929, which would have resulted in a saving of approximately \$3.50 per ton. The price advance of November 11, 1929, shown in affidavit of J. C. Lynch from \$44.00 per ton to \$47.00 per ton is \$3.00 a ton. However, the decreased freight on July 1, 1930 was \$4.50 a ton. Also, the use of cheaper bags made a saving of \$3.50 a ton. Therefore, by taking into account the reduced freight and cheaper bags, there was an advance in bulk borax at the plant by July, 1930, of \$11.00 a ton.

By making allowances for freight and the cost of bags and omitting the prices of borax during the abnormal times of World War I, and the period immediately following World War I, the price of borax in bulk f.o.b. Searles Lake, using prices shown by J. C. Lynch from 1921 to 1942 was approximately as follows: [133]

Date	Price of Borax Eastern Territory	Deductions for Freight	Deductions for Bags (Approx.)	Price in bulk f.o.b. Searles Lake (Approx.)
Spring, 1914.....	\$ 75.00	\$21.00	\$6.00	\$48.00
Aug. 15, 1921.....	105.00	(Approx.) 21.00	6.00	78.00
May 12, 1924.....	95.00	(Approx.) 21.00	6.00	68.00
Oct. 25, 1926.....	80.00	19.50	6.00	54.50
Sept. 19, 1927.....	75.00	19.50	6.00	49.50
June 7, 1928.....	60.00	19.50	6.00	34.50
June 28, 1928.....	50.00	19.50	6.00	24.50
April 19, 1929.....	44.00	19.50	2.50	22.00
Nov. 11, 1929.....	47.00	19.50	2.50	25.00
July 1, 1930.....	47.00	15.00	2.50	29.50
March 23, 1932.....	36.00	15.40	2.50	18.10
June 17, 1935.....	40.00	16.00	2.50	21.50
June 7, 1937.....	42.00	16.40	2.50	23.10
July 1, 1938.....	43.00	17.60	2.50	22.90
Feb. 6, 1942.....	45.00	17.60	2.50	24.90

Affiant denies that said prices set forth by said J. C. Lynch are correct in all instances.

In said affidavit of J. C. Lynch, the price of borax on April 19, 1929 is shown as \$44.00 per ton eastern territory, but affiant alleges that defendants, or some of them, were selling borax below \$44.00 per ton in said territory and even as low as \$38.00 per ton. Such a price would correspond to \$16.00 a ton in bulk f.o.b. Searles Lake.

Plaintiff shipped its last carloads of borax, which it had on hand in its warehouse at Searles Lake, in October, 1929 whereupon defendants, or some of them, raised their prices of borax on November 11, 1929. Affiant has in his possession a copy of a price schedule of Defendant Pacific Coast Borax Company showing the price of \$50.00 a ton for borax in bags f.o.b. Pacific Coast Terminal Points, such [134] as at Wilmington, California. Such a price advance corresponds to a bulk price of about \$42.00 f.o.b. Searles Lake, California. Plaintiff's principal market for its borax had been in the eastern part of the United States and in Europe where plaintiff was obliged to compete with the low price fixed by Defendant Pacific Coast Borax Company, but as soon as plaintiff shipped all of its carload borax, Defendant Pacific Coast Borax Company thereupon advanced its price to \$47.00 in eastern territory, and, in California, where it mines and refines its borax, advanced the price thereof to even a greater degree.

Some of the last carload shipments of borax from plaintiff's warehouse at Searles Lake, California, was consigned to a warehouse in the eastern territory and sold by plaintiff at various times during the year of 1930.

Defendant Borax Consolidated, Ltd., had refineries in New Jersey, Great Britain, and Continental Europe. Kernite ore from Defendant Pacific Coast Borax Company's mine at Kramer, California, was shipped in crude form to these refineries and processed there for market. Kernite contains only four molecules of water, whereas commercial borax contains ten molecules of water. One ton of Kernite produces about 1.39 tons of commercial borax. Had plaintiff secured a lease on the Little Placer Claim, plaintiff would have had buyers in Europe with refineries to purchase Kernite ore which could have been shipped at equal savings and plaintiff would have used its Searles Lake plant to process borax for the domestic market.

In order to offset the advantage held by Kernite because of its low water content, Defendant American Potash & Chemical Corporation and the West-end Chemical Company both developed processes of reducing standard commercial borax to anhydrous borax, thus making additional [135] savings in packaging and in freight to market. One ton of anhydrous borax equals 1.89 tons of standard commercial borax. Had plaintiff continued to produce borax there would be no reason why plaintiff could not also have produced anhydrous borax with equal savings.



## The Gerstley Letter

In Paragraph 81-B of the complaint on file herein, and which paragraph is one of the amendments made to said complaint, it is charge that said defendants, or some of them, fraudulently caused their books and records to be changed, altered, destroyed or substituted in an endeavor to prevent the true facts, situations and purposes of defendants in the carrying on of such conspiracies and combinations charged in said complaint from being known or disclosed to plaintiff or other parties and in order to give a false and incorrect statement of their affairs, conditions, activities and purposes.

Such allegation is fully supported by the letter from J. M. Gerstley, Assistant General Manager of Pacific Coast Borax Company and the Borax Consolidated Group, dated July 8, 1937 to William Gauge, a San Francisco exporter, and which letter appears in the criminal proceedings against said defendants, or certain of them, formerly pending in this Court and numbered 28900-S; said letter constitutes Exhibit "A," attached to Document No. 75 of the records of said criminal proceeding now on file with the Clerk of the above entitled Court; said letter reads in part as follows:

I am returning these letters to you as I don't want them on our files. I think and so does F. M. J., that our letters to each other should not refer to agreements—gentlemen's or otherwise—other than Western contract, unless in notes like this, and I suggest you "lose" your file copies of the attached letter." (Emphasis supplied.) [136]

Affiant respectfully submits that both he and plaintiff did everything possible, during the period hereinabove set forth, to secure proof of the possibility as to the violations by defendants, or some of them, of the Anti-Trust Laws in their borax business, and in this connection alleges that neither the Department of Justice nor the Department of the Interior of the United States Government were able even with their able and large investigating facilities to discover proof of such violations of the Anti-Trust Laws by defendants, or some of them, until the agents of the Department of Justice secured access to the books and effects of the American Potash & Chemical Corporation in 1942, after they had been sized by the Alien Property Custodian of the United States, subsequent to the Declaration of War between the United States and Germany. Affiant used every endeavor possible and pursued every line of investigation within his power to confirm the possibility of such Anti-trust violations but was unsuccessful in his said efforts, largely but not wholly, by reason of the said statements made to him by officials of the said Department of Justice as well as officials of said Department of the Interior, all of which statements affiant believed and now believes to have been made to him in good faith and constituting the truth when so made to him by said officials. Due to the fact that those controlling the interests of defendants, or most of them, were foreign citizens, and that the secret and confidential records of said defendants, or most of them were kept in their head offices in

foreign lands, defendants were able to conceal their activities and violations of the Anti-Trust Laws.

By reason of the foregoing, affiant respectfully submits that said Motions for Summary Judgment and for Dismissal should be denied. [137]

GEORGE B. BURNHAM

Subscribed and sworn to before me this 19th day of February, 1946.

[Seal] LAURA E. HUGHES,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires March 3, 1948.

[Endorsed]: Filed Feb. 26, 1947.

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[Title of District Court and Cause.]

REPLY AFFIDAVIT OF MOSES LASKY IN  
SUPPORT OF DEFENDANTS' MOTIONS  
TO DISMISS AND FOR A SUMMARY  
JUDGMENT.

State of California,  
City and County of San Francisco—ss.

Moses Lasky, being first duly sworn, deposes and says:

That he is one of the attorneys for defendants Pacific Coast Borax Company, United States Borax Company and Borax Consolidated, Ltd.

On Monday, March 4, 1946, this Court granted "Defendants' [139] Motion for Documents under Rule 34 in Connection with Motions to Dismiss and



for Summary Judgment.” Immediately thereafter affiant was shown certain documents by George B. Burnham, and said Burnham gave to the affiant copies thereof.

For the purpose of bringing the whole of said document before the Court pursuant to Rule 56(e) of the Rules of Civil Procedure, affiant attaches hereto true photostats of the following copies given by George B. Burnham to the affiant as aforesaid:

1. As Exhibit A, letter from B. D. Townsend, attorney for Burnham Chemical Company, to Mr. H. Stanley Hinrichs, c/o Bright, Thompson & Hinrichs, Southern Building, Washington, D. C., dated July 26, 1928.

2. As Exhibit B, letter dated November 13, 1928 from B. D. Townsend, on the letterhead of Francis J. Heney, to Mr. G. B. Burnham.

3. As Exhibit C, memorandum entitled “Application of Federal Trade Commission to Borax Conditions,” being one of the memoranda prepared by B. D. Townsend and sent to B. G. Burnham with the above letter of November 13, 1928.

4. As Exhibit D, letter from Judge Francis J. Heney to G. B. Burnham dated August 3, 1934.

5. As Exhibit E, letter dated August 3, 1934 from Francis J. Heney to Louis Glavis, Bureau of Investigation, Interior Department, Washington, D. C.

6. As Exhibit F, printed letter of George B. Burnham as President of the Burnham Chemical Company to “Dear Stockholder,” dated September 3, 1937, being a [140] circular letter to stockholders of the plaintiff company.

7. As Exhibit G, letter of November 22, 1939, from George B. Burnham to Mr. Thurman W. Arnold, Assistant Attorney General, Department of Justice, Washington, D. C.

8. As Exhibit H, mimeographed copy of letter from George B. Burnham to Secretary of the Interior, Washington, D. C., dated November 18, 1939.

9. As Exhibit I, letter dated January 30, 1940, from G. B. Burnham, President of the Burnham Chemical Company, to Mr. Morris Clark, United States Department of Justice, Room 422, Post Office Building, 7th and Market Street, San Francisco, California.

The passages in the foregoing letters and documents to which defendants wish to call particular attention are the following:

1. In the letter of November 13, 1928, from B. D. Townsend to Mr. George B. Burnham:

“Herewith I also hand you a memorandum concerning the ‘Application of Federal Trade Commission Laws to Borax Trade Conditions.’ In this document, I have merely given my ultimate conclusions, \* \* \*

“The conclusion which I have expressed in the latter memorandum is supported by a very extensive study which I have given the subject during the past two weeks. I am now convinced that proceedings before the Federal Trade Commission would result in substantial benefits to those interested in the subject.”

2. In the memorandum entitled “Application of Federal Trade Commission Laws to Borax Trade Conditions”: [141]

“For about three years, and particularly during the past year, a persistent price-war has been waged in the Borax Trade, until the price has been reduced to a point below actual cost of production, if all of the actual elements of production-cost are included in the computation, and the methods of computation are otherwise correct.

“This situation imperils the continued existence of competition in the Borax Trade, and will ultimately lead to the establishment of an absolute trust, if the causes of the situation are not terminated.

“Various excuses and explanations are offered by those responsible for this situation, but it is quite evident that these excuses and explanations are more cloaks and disguises, and that an adequate investigation of the subject will develop proof that this situation is the natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Anti-Trust Laws.

“These unlawful practices may be concealed by clever theories and ingenious accounting devices, but when the true facts are disclosed, the very cleverness and ingenuity employed to cloak and disguise the true facts, will become added and persuasive proof of consciousness of an illegal purpose.

\* \* \* \* \*



“In the event that the investigation results in the filing of charges by the Commission, any interested party, whose interest will be [142] affected by the result of the hearing, will be permitted to intervene.”

3. Letter of August 3, 1934, from Francis J. Heney to Louis Glavis:

“This will introduce my friend and former client, George B. Burnham, who desires to talk with you about a matter which I think it is well worth your while to investigate, to wit, the matter of the Pacific Coast Borax Company having established, continued and maintained an evil and strangling monopoly in the borax business.”

4. In the letter of November 22, 1939 from G. B. Burnham to Mr. Thurman W. Arnold:

“The American Potash & Chemical Corporation and the Pacific Coast Borax Co. are both English owned companies, and the two together constitute the British Borax Trust. \* \* \*

“However, the very month the Burnham Chemical Co. started production of borax, in June, 1928, a drastic cut in the price of borax occurred, with the result that, in a few months, we were forced out of business. From outward appearances, it appeared that the price war on borax was between the two big English producers—namely, the American Potash & Chemical Corporation and the Pacific Coast Borax Co. The fact that the main price cutting in the price war started the month we began production convinces us that it was aimed purposely to destroy us. At least that was the resulting effect of the price war.

“We took the matter up with our attorneys, [143] Francis J. Heney and B. D. Townsend, to see if we did not have a case against the Trust for violating the Sherman Anti-Trust Laws. These attorneys, who are now both deceased, felt that we had a case, but we were so completely ruined as a result of the price war, and also in debt, that we were financially unable to employ the attorneys to go ahead with the matter.

“As time goes on, more evidence has been gathered to show that the two British-owned borax and potash producers in this country are building up a monopoly to drive out all American competition. And so, since you are making an investigation of the fertilizer industries, I am bringing our situation to your attention at this time.

“Enclosed you will find a copy of a letter written by Mr. B. D. Townsend to H. S. Hinrichs, dated July 26, 1928, in which Mr. Townsend points out certain features of the unfair methods of competition being used by the British Borax Trust.”

5. In the letter of September 3, 1937, from the Burnham Chemical Company to its stockholders:

“When we finally got the borax unit of our plant built in 1928 (by having money sent to us by express) the acquisition of the borax deposits at Kramer, California, by the foreign owned borax interests together with the increased production made by foreign owned interests at Searles Lake, enabled both these foreign owned interests to make such drastic cuts in the price of [144] borax that

we could make no profit. The borax trust started its drastic cut in prices the very month we started production. \* \* \*

“These low prices (in 1930) were the result of the still greater increased production by foreign owned interests at Searles Lake and the acquisition by foreign owned interests of the Kramer Borax deposits.”

6. In the letter of George B. Burnham to the Secretary of the Interior, November 18, 1939, on page 4:

“But the very month our production started, in June, 1928, the American Potash & Chemical Corporation and the Pacific Coast Borax Co., both foreign owned companies, began cutting the price of borax from approximately \$60.00 per ton f.o.b. Searles Lake to about \$18.00 a ton. Our cost of production was \$26.00 per ton, so, when the price fell below \$26.00 we were losing money—and we had to close down our plant. After we stopped our small production the price went up. \* \* \*

“It is evident that the foreign-owned borax interests realized that if the solar methods of production got an adequate start they could become serious competitors to themselves; it would break the British monopoly of the potash and borax industry in this country; and so this drastic cut in the price of borax was aimed at us, to drive cheaper methods of production from the field. The new source of borax in [145] the Kramer Borax fields was the excuse of the Borax Trust for cutting the price of borax, but that field had been in production for a



year before we started production. Furthermore, after we stopped our small production, the price went up.”

On page 5 of the same letter:

“Stephen T. Mather was, at one time, Chicago Manager of the Pacific Coast Borax Co. and was Assistant to the Secretary of the Interior from 1915 to 1917, and was a Director of the National Parks Service of the Department of the Interior from May 16, 1917, up until the time of his death, about 1930. (See Who's Who in America, 1926.) While he held this high government position, he was also Vice-President of the Sterling Borax Co., which is a subsidiary of the Pacific Coast Borax Co., a foreign-owned enterprise. Stephen T. Mather admits that he was in a measure responsible for the Post Office Fraud Order being issued against the Burnham Chemical Company, in a letter dated October 8, 1926, written to Clarence Whitney, one of the Directors of the Burnham Chemical Co. A copy of his letter is enclosed. \* \* \*

“Mr. Mather himself admits the process may be all right and the foreign-owned Borax Trust itself endorses the process. And so they were afraid we would be a formidable competitor, and Mr. Mather influenced the Post Office to issue a Fraud Order so we would not raise funds. Mr. Mather was a high government official and also an officer and stockholder in the British-owned Borax Trust.”

7. In the letter of January 30, 1940, from George B. Burnham, President of the Burnham

Chemical Company, to Mr. Morris Clark of the Department of Justice, referring to the price cuts of 1928, he states, and the underscoring is his:

“That was the very month we started our borax production, June, 1928. We continued our production until January 1929 and we were then forced to shut down due to price cutting. From stocks of borax on hand we continued to sell borax until the fall of 1929. During this period the price of borax continued to fall still more. \* \* \*

“By the fall of 1929 all the borax stored in our warehouse was sold \* \* \*

“As long as we threatened renewal of our production or had stocks of borax on hand, the price stayed down, but when all our borax was sold and we were eliminated as a competitor, the price went up. \* \* \*

“However, the long duration of the depression and the cheaper source of borax in the new Kramer Borax Field has kept the price down so that it has never yet returned to its former price level that existed prior to June, 1928.” [147]

MOSES LASKY.

Subscribed and sworn before me this 6th day of March, 1946.

EUGENE P. JONES,

Notary Public in and for the City and County  
of San Francisco, State of California.

(Admission of Service).

(Attached to the foregoing document are the following Exhibits, to wit):

Ex. A, identical with Defts' Ex. J. introduced at trial. Ex. B, identical with Defts' Ex. K. introduced at trial. Ex. C, identical with Defts' Ex. L introduced at trial. Ex. D, identical with Defts' Ex R introduced at trial. Ex. E, identical with Defts' Ex. S introduced at trial. Ex. G, identical with Defts' Ex. A introduced at trial. Ex. H, identical with Defts' Ex. H introduced at trial. Ex. I, identical with Defts' Ex. Z introduced at trial. [148]

#### EXHIBIT "F"

George B. Burnham, 214 E. C. Lyon Building,  
Reno, Nevada.

September 3, 1937.

Dear Stockholder:

A crisis has been reached in the affairs of your company in which it is absolutely necessary to pay the rent on our potash lease at Searles Lake, California, or the Government will cancel the lease. We now owe the Government five year's rent amounting to \$11,400. Things look dark, yet there is light on the horizon that may lead to some kind of Government aid if you assist us.

In my personal letter to you of March 2, 1936, I advised all the stockholders that the Government had brought suit to cancel our lease and that we should have \$10,000 immediately to pay the rent



and take care of other necessary expense. That appeal brought in only \$316.00. Since then we have been successful in delaying the suit. In fact for a while we thought we could make other arrangements to pay the rent, but now on September 13, 1937, the suit must come up for trial and since we are now five years in default we will surely lose the lease and our investment of \$1,500,000 unless the rent is paid.

The reasons why the rent has not been paid and we could not even develop our lease during the last five years, are as follows:

1. The Post Office Fraud Order of June, 1925 prevented us from raising adequate funds when business conditions were good.

2. When we finally got the borax unit of our plant built in 1928, (by having money sent to us by express) the acquisition of the borax deposits at Kramer, California, by the foreign owned borax interests together with the increased production made by foreign owned interests at Searles Lake, enabled both these foreign owned interests to make such drastic cuts in the price of borax that we could make no profit. The borax trust started its drastic cut in prices the very [149] month we started production. We were not equipped to make other chemicals like the foreign owned interests at Searles Lake, and so we had to shut down.

3. Finally when the United States Court handed down a decision in February, 1930 in our favor, forbidding the enforcement of the Fraud Order be-

cause there was no evidence of Fraud before the Post Master General, this country was entering upon a great depression making it impossible to raise money to build a multi-product plant large enough to compete with the low prices prevailing. These low prices were the result of the still greater increased production by foreign owned interests at Searles Lake and the acquisition by foreign owned interests of the Kramer Borax deposits. . .

Since then we have been seeking capital in various ways. We may yet raise enough money directly or indirectly to build a plant large enough to operate profitably, a plant that will successfully compete with the growing foreign owned neighbor at Searles Lake, who has already produced over \$40,000,000 worth of chemicals from the Searles Lake Potash Reserve and who is continually increasing his production. It is reported that earnings for 1936 were \$2,053,905, out of which they paid \$1,188,877 in dividends. Some of you are familiar with certain other efforts being made to raise capital.

However, I feel that the time has come when the Government itself should provide some form of relief or assistance in order that we can get into profitable production quickly. The United States Senate has appointed a committee to investigate the Potash industry, and we have been asked to submit any material which we may deem important in this investigation. Besides submitting a formal statement in writing, I recently called upon Senator Key Pittman of Nevada, Chairman of this Committee, and discussed the conditions of the industry and

your company in detail. I also called on other Government officials. In these discussions I pointed out that our company is particularly entitled to consideration because of the damage done to it and the stockholders in the issuing of a Post Office Fraud Order when there was no fraud. [150]

At a meeting of the Philadelphia Stockholders held in Philadelphia on June 17, 1937, resolutions were passed requesting the Government for a subsidy of \$5,000,000 for the Burnham Chemical Company and other compensation in view of the disadvantages which the company has suffered through Government action. A copy of the resolutions were sent by the Philadelphia stockholders to the President of the United States, Secretary of the Interior and certain members of Congress. A copy is enclosed for your information.

The resolutions and preamble point out how unfair it is for the Government to permit a foreign owned company to own its potash deposit at Searles Lake, California, and permit them to recover all the valuable chemicals they want without paying any royalty to the Government and then place an unjust barrier in the form of a Fraud Order upon us Americans when we were trying to develop the property and pay the Government a royalty.

How unfair of our Government to grant them ownership of these lands and also grant ownership to sodium borate deposits at Kramer, California, but demand that we Americans lease our lands and pay rents and royalties, and if we can't pay we lose



our lease, even though all these acts were in accordance with the law as viewed by the Department of the Interior at that time.

The resolutions further point out that now that the Government has granted ownership to the center of the Searles Lake Potash Reserve to a foreign owned company has passed the outright ownership to the largest sodium borate deposit in the world at Kramer, California, to another foreign owned interest, that now, the stockholders of the Burnham Chemical Company should demand, through proper legislative acts of Congress, a \$5,000,000 subsidy for the Burnham Chemical Company.

Such a subsidy or outright gift, would be used to enable the Company to get into profitable production, and we would be partially compensated for the irreparable damages done to the company by the stigma of the Post Office Fraud Order and the losses and discouragements thereby sustained by its 7000 American Citizen stockholders. [151]

The directors of your company commend these acts of loyalty of the Philadelphia stockholders and we wish to express our gratitude to Mr. Frank B. Stockley, Chairman of the Philadelphia Stockholders Committee, who is leading the Philadelphia stockholders in their fight for justice through Congressional legislation, and all others who are assisting in this work.

Now that the fight for justice has been started it should be carried on to a successful conclusion. It will require money to carry on the fight. The payment of the rent on the lease does not do us any

good unless we have money to develop the lease. I am therefore asking you first for a contribution in order to have funds to carry on this fight for a \$5,000,000 subsidy so ably started by the Philadelphia stockholders, and to seek private capital. We have three financially responsible parties who are considering financing us, but it takes time and money to carry on negotiations. Funds should also be provided to pay the rent on the lease before September 13, 1937, for the payment of the rent holds our lease and gives us more time to raise the money to develop it. The fight for the \$5,000,000 subsidy should be carried on with vigor for it is only just that we should have it.

Why should foreign owned interests have ownership to valuable potash deposits in the Searles Lake Potash Reserve and we Americans who have spent \$1,500,000 in our endeavor to develop these Government deposits have our lease and investment taken away from us through no fault of ours?

Why should foreign owned interests be granted ownership to the largest sodium borate deposit in the world at Kramer, California, and yet we Americans, who have continually fought for these deposits on behalf of the government, are having a hard time in getting a lease on even 10 acres of the apparently known sodium borate deposits in this great Kramer borax field? America for Americans is our motto. No doubt the Department of the Interior have acted in accordance with the law as they viewed it at that time, but why should foreign owned interests get all the benefits?

Stockholders of the [152] Burnham Chemical Company! It is time that we rise up in defense of our interests! Enough damage was done to you when the Fraud Order was issued against your company. There is no need of adding further suffering by taking away our lease and borax plant. It is now time that we have some compensation for all the damage done to our company. A \$5,000,000 subsidy from the Government is a modest request after all, when all things are considered, and, I believe there is a possibility of getting it if you will contribute such funds as you can to this fight for justice.

Whether or not this subsidy is granted, or any direct financial assistance is given by the government, I expect that as a result of the work of the Potash Investigation Committee, some form of legislation will be enacted or something will be done to encourage the development of Government leases. If this is done we should be able to make some arrangement for the development of our property. In any event if the rental is paid it should afford us time and opportunity to work out arrangements for development by private capital. By all means we want to pay our lease rental and thus keep our lease in good standing.

Some of you may be able to contribute \$100 or \$500 in this worthy cause, others may only be able to contribute \$5 to \$50, but make the amount of your contribution as great as possible. You can pay it in installments if you wish. Through your contribution you help us gain recognition in Congress that might result in a \$5,000,000 victory.



Our stock is non-assessable and we cannot levy assessments. There is no penalty we can levy if you do not contribute, but there is the almost certain penalty of losing your entire investment and losing a glorious fight for Justice, if you do not contribute.

So make your contributions on the enclosed blank as much as you can and as quickly as you can. If not enough money is received to pay the rent then the funds that are received will be used to carry on our fight for financial aid through Congress. But we should have enough money to do both. So make your contributions large.

Mail your contribution now so we can pay our rent before September 13, 1937.

A contribution from everybody should save our lease, give us time [153] for further financing and may bring us a \$5,000,000 atonement for damages.

Faithfully yours,

G. B. BURNHAM,

President, Burnham Chemical  
Company.

Please advise us of any change of address.

.. .. .  
Contribution Fund for Justice  
.....1937

G. B. Burnham,  
Box 811, Reno, Nevada.

I hereby contribute \$..... for your fight for justice on behalf of the stockholders of the Burnham Chemical Company.

Enclosed find my remittance of \$. . . . . as full payment/as part payment. I will pay the balance as follows: . . . . .

You may use this money in any way you think best to carry on your fight, which in your judgment may be for the best interest of the Burnham Chemical Company stockholders.

. . . . .  
 . . . . .  
 . . . . .

(The foregoing Exhibit "F" is attached to Reply Affidavit of Moses Lasky in Support of Defendants' Motions to Dismiss and for a Summary Judgment.)

[Endorsed]: Filed March 6, 1946.

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[Title of District Court and Cause]

**SUPPLEMENTAL AFFIDAVIT OF  
 GEORGE B. BURNHAM**

United States of America,  
 Northern District of California,  
 City and County of San Francisco—ss.

George B. Burnham, being first duly sworn, deposes and says:

That he is now and at all times herein set forth has been President of Burnham Chemical Company, the plaintiff above named:

That he has read the affidavits of Moses E. Lasky

dated March 6, 1946 to which are attached photostatic copies of letters written by affiant and the attorneys for plaintiff herein.

That in November, 1928, Mr. Francis J. Heney and Mr. B. D. Townsend, attorneys for plaintiff were of the opinion that a price-war was being waged in the borax trade in violation of the anti-trust laws and they felt that Burnham Chemical Company had a case against its competitors under the anti-trust laws, if evidence could be gathered to prove such violation and such statement was what affiant referred to in his letter to Thurman W. Arnold, dated November 22, 1939 and set forth in part in the said affidavit of Mr. Moses Lasky, page (5) thereof, and sworn to on March 6, 1946.

Affiant and Mr. Townsend, at plaintiff's expense, endeavored to obtain such evidence and even went to Washington, D. C. in the Spring of 1929 and conferred with Government officials there and especially with officials in the Department of Justice and Federal Trade Commission [155] in an endeavor to obtain evidence to support such a charge and we also went to New York City to obtain evidence but in all such efforts we were unsuccessful.

Although plaintiff was unable to employ Mr. Townsend or Mr. Heney, to continue their investigation and search for such evidence after 1929, nevertheless, affiant continued his investigation independently with occasional conferences with Mr. Townsend from time to time thereafter.



At one of these conferences on October 11, 1934, Mr. Townsend recommended to affiant that affiant investigate to see if there was not some single company that controlled both defendant American Potash and Chemical Corporation and defendant Borax Consolidated Ltd., such as the Goldfields Consolidated of South Africa. He believed that maybe there was some published report on it and if affiant could find such a report, or some proof of common control, it would be substantial evidence to support a charge of violating the law. Affiant was never able to find any such report that the Goldfields Consolidated of South Africa controlled said defendants or any other evidence that would support a charge, until the fall of 1944 when the Government brought its suit against said defendants under the Sherman Anti-Trust Act.

GEORGE B. BURNHAM.

Subscribed and sworn to before me this 8th day of March, 1946.

[Seal]

LAURA E. HUGHES,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires March 4, 1950.

[Endorsed): Filed March 11, 1946. [156]

In the Southern Division of the United States District Court for the Northern District of California

No. 24948-G

BURNHAM CHEMICAL COMPANY,  
a Corporation,

Plaintiff,

vs.

BORAX CONSOLIDATED, LTD., et al.,  
Defendants.

### MEMORANDUM DECISION

On Motions to Dismiss, for Summary Judgment,  
and to Quash for Lack of Venue

The motion for summary judgment in favor of defendants may be granted only if “\* \* \* except as to the amount of damages, no genuine issue as to any material fact” justifies judgment as a matter of law. Rule 56(c) Rules of Civil Procedure. *Detsch & Co. v. Amer. Products Co.* 9 Cir. 152 Fed. 2d 473. The burden of negating existence of a genuine issue of fact is upon movant and any doubt must be resolved against him. *Walling v. Fairmount Creamery Co.* 6 Cir. 139 Fed. 2d 318.

It is urged as a basis for the motion for summary [157] judgment that the cause is barred by the statute of limitations. This is a proper ground of motion. *U. S. etc. v. Fleisher*, 45 Fed. Supp. 781; *Reynolds v. Needles*, *infra*. Affidavits in support of the motion set out proceedings in the District Court

of the United States for the District of Nevada, over fifteen years prior to the filing of this action, wherein the present plaintiff there made, under oath, allegations indicating knowledge at that time of the conspiracy made the basis for this action for damages under the Anti-Trust Act. (15 USCA 15). Plaintiff denies the existence of knowledge then and alleges fraudulent concealment of the alleged conspiracy by defendants until its discovery shortly prior to the filing of this action.

While it would appear from the record here, that plaintiff may have great difficulty in producing credible evidence to defeat the defense of limitations, the Court would not, upon that basis, be justified in granting the motion. *Griffin v. William Penn Broadcasting Co.* 4 F.R.D. 475; *Whitaker v. Coleman*, 5 Cir. 115 Fed. 2d 305. The court under such circumstances must be convinced that such evidence is "in its nature too incredible to be accepted by reasonable minds or that conceding its truth, it is without legal probative force." *Whitaker v. Coleman*, *supra*.

In this circuit, the Court of Appeals appears to look with disfavor upon motions for summary judgment, unless as in the case of *Gifford v. Travellers Protective Assoc.*, 9 Cir. 153 Fed. 2d 209, there is no evidence of any kind tendered in opposition to the motion, and the evidence in support thereof is factually indisputable and legally conclusive. *Id.* *Reynolds v. Needles D. C.* 132 Fed. 2d 161; *McGrath v. Helene Rubenstein*, 29 Fed. Supp. 822. See *Detsch & Co. v. Amer. Products Co.* *supra*. [158]



The admonition of our Circuit Court of Appeals causes me to deny the motion for summary judgment.

The issue of the statute of limitations, however, should be resolved preliminarily upon a separate trial. Rule 42 (b) Rules of Civil Procedure.

I am of the opinion that the interests of justice and of the parties will best be served if this issue is determined before litigating the larger issues involved in the merits of the controversy. *Canister Co. v. National Can Corp.* 3 F.R.D. 279; *Clark v. Lowden*, 48 Fed. Supp. 261, 266; *Berghane v. Radio Corp. of America* 4 F.R.D. 446.

Defendants may file within 10 days a special answer setting up the defense of the statute of limitations. Thereupon either side may move the court to set the special issue for trial. The time of defendants to answer on the merits is extended to a date 10 days after the determination of the special issue, if the same is decided adversely to them.

Decision on the motions to dismiss and strike is reserved until the special issue is decided. Rule 12 (d) Rules of Civil Procedure.

The motion of defendant United States Borax Company to quash summons and to dismiss for improper venue is denied. *Mississippi Publishing Corp. v. Murphree* U. S. Supreme Court No. 234 Oct. term 1945, 66 S. Ct. 242. Dated: September 20, 1946.

LOUIS P. GOODMAN,

United States District Judge.

[Endorsed]: Filed Sept. 20, 1946. [159]

[Title of District Court and Cause.]

SPECIAL ANSWER OF AMERICAN POTASH  
& CHEMICAL CORPORATION TO PLAINTIFF'S COMPLAINT AS AMENDED

Comes now the defendant, American Potash & Chemical Corporation, and in compliance with the order of this court dated September 20, 1946, filed this its special answer, limited to the defense of the Statute of Limitations only, to the plaintiff's complaint as amended, and hereby expressly reserves the right to hereafter file a general answer, alleging, stating and denying as follows:

1. That the cause of action set forth in the plaintiff's complaint as amended alleges that the defendants committed certain alleged wrongful acts in a period prior to 1929 which resulted in injury and damage to the plaintiff in January of 1929; that said cause of action, either as pleaded or otherwise, did not accrue within three years next before the commencement of this action, and did not accrue within three years next before September 14, 1944, and did not accrue within three years next before October 10, 1942, but accrued, if at all, more than three years prior to all of said dates; that by reason thereof, the cause of action stated in the plaintiff's complaint as amended is barred by the Statute of Limitations and by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure and Subdivision (4) of Section 338 of the California Code of Civil Procedure.

2. Said defendant alleges further that the alleged cause of action is barred by the provisions of each and all of the following:

(a) California Code of Civil Procedure, Section 338, Subdivision (2); [160]

(b) California Code of Civil Procedure, Section 338, Subdivision (3);

(c) California Code of Civil Procedure, Section 340, Subdivision (1);

(d) The statute of limitations.

3. In answer to the averments contained in paragraph numbered 75 of plaintiff's complaint as amended, this answering defendant, being without knowledge or information sufficient to form a belief as to the truth thereof, denies said averments and demands strict proof thereof.

4. In answer to the averments contained in paragraph numbered 81-A of plaintiff's complaint as amended, this answering defendant denies that the plaintiff had no knowledge either of the alleged conspiracies and combinations set forth, or of the alleged intent or purposes of the defendants in the performance of the acts set forth, until on or about September 14, 1944; and defendant denies both that plaintiff had no knowledge prior to September 14, 1944, and that plaintiff had no opportunity to secure such knowledge, of the acts, things and proceedings alleged to have been had and engaged in by said defendants, and of the alleged fraudulent and illegal formation of a conspiracy, and of prior agree-



ments alleged to have led thereto, and of alleged subsequent agreements with respect thereto; and defendant denies that the alleged acts, or any of them, of this defendant or the other defendants, or of any of them, as described in plaintiff's complaint as amended, or the formation of the conspiracies and combinations, or of any of them, as described in plaintiff's complaint as amended, were fraudulently or otherwise concealed from the plaintiff; and defendant further denies each and every other averment contained in said paragraph numbered 81-A not herein specifically denied. [161]

5. In answer to the averments contained in paragraph numbered 81-B of plaintiff's complaint as amended, this answering defendant states that if the averments, or any of them, therein set forth are or is intended to refer to this answering defendant, this defendant denies each and every averment therein contained, but if the averments or any of them therein contained are or is intended to refer to some other defendant, then this answering defendant, being without knowledge or information sufficient to form a belief as to the truth thereof, denies said averments and each of them and demands strict proof thereof.

6. For further answer, this answering defendant states that the statements alleged to have been made by C. B. Zebriskie of the Pacific Coast Borax Company, all as set forth in paragraph numbered 75 of plaintiff's complaint as amended, if so made, were made without the consent, knowledge, approval

or authority of this answering defendant and were not and are not the statements of this answering defendant, and were not and are not in any wise binding upon or chargeable to this answering defendant.

Wherefore, this answering defendant prays that the court fix a date for a special hearing on the issues herein raised and, upon such hearing, order that the cause of action contained in plaintiff's complaint as amended be dismissed with prejudice and at plaintiff's costs and that this answering defendant recover its costs herein expended.

AMERICAN POTASH &  
CHEMICAL CORPORATION

By /s/ OLIVER DONNALLY,  
/s/ WILLIAM J. FROELICH,  
/s/ CHARLES A. BEARDSLEY,  
/s/ PHILIP M. AITKEN,

Its Attorneys.

Received copy of foregoing answer September 30, 1946.

STERLING CARR by W. C.,  
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 30, 1946. [163]

[Title of District Court and Cause.]

SPECIAL ANSWER OF DEFENDANTS PACIFIC COAST BORAX COMPANY, BORAX CONSOLIDATED, LTD., AND UNITED STATES BORAX COMPANY TO COMPLAINT, AS AMENDED, SETTING UP DEFENSE OF STATUTE OF LIMITATIONS

Pursuant to the order of this Court made on September 20, 1946, and reserving all rights to plead further to the complaint as amended in the event the issue of the Statute of Limitations presented by this answer is decided adversely to them, the defendants Pacific Coast Borax Company and Borax Consolidated, Ltd., and defendant United States Borax Company without waiving its exception to the court's order overruling its motion to quash purported service of summons and to dismiss action for improper venue, file this, their special answer to the complaint, as amended by "Amendment to Complaint" filed November 29, 1945, to set up the defense of the Statute of Limitations, and to that end these defendants deny and allege, as follows:

I.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the following averments in paragraph 75 of the complaint:

"That in May, 1929, said Burnham called upon C. B. Zabriskie, the manager of defend-



ant Pacific Coast Borax Company, at his office in New York City, and protested against the said cuts made by defendants in the price of Borax and charged said defendants with so doing for the purpose of eliminating, and with the intent so to do, plaintiff from its operations at Searles Lake and from any competition with the products of defendants; and that at said time said Zabriskie denied the said charges of said Burnham and claimed that such cuts were made solely by reason of the discovery of kernite at the Kramer Borax Fields in Kern County, California, \* \* \* and further stated that defendants had no desire or intention to injure or damage plaintiff.” [164]

Defendants expressly deny each and every one of the remaining allegations of said paragraph 75.

## II.

Deny each and every allegation of paragraph 81-A of the complaint, added to the complaint by said “Amendment to Complaint” filed November 29, 1945.

## III.

Deny each and every allegation of paragraph 81-B of the complaint, added to the complaint by said “Amendment to Complaint” filed November 29, 1945.

## IV.

Allege that the action alleged in the complaint is barred by the provisions of subdivision 1 of Section 338 of the California Code of Civil Procedure.

## V.

Allege that the said action is barred by the provisions of subdivision 4 of Section 338 of the California Code of Civil Procedure.

## VI.

Allege that the said action is barred by the provisions of subdivision 2 of section 338 of the California Code of Civil Procedure.

## VII.

Allege that the said action is barred by the provisions of subdivision 3 of Section 338 of the California Code of Civil Procedure.

## VIII.

Allege that said action is barred by the provisions of subdivision 1 of Section 340 of the California Code of Civil Procedure.

## IX.

Allege that the right of action set forth in the complaint did not accrue within three years next before the commencement [165] of the action but accrued prior to said three years.

X.

Allege that the right of action set forth in the complaint did not accrue within three years next before September 14, 1944, but accrued more than three years prior to said date.

XI.

Allege that the right of action set forth in the complaint did not accrue within three years next before October 10, 1942, but accrued more than three years prior to said date.

XII.

Allege that the said action is barred by the Statute of Limitations.

Wherefore, defendants pray plaintiff take nothing by its action and that they be hence dismissed with their costs herein incurred.

NEWLIN, HOLLEY,  
SANDMEYER & COLEMAN,  
/s/ MAURICE E. HARRISON,  
/s/ MOSES LASKY,  
BROBECK, PHLEGER &  
HARRISON,

Attorneys for Defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., and United States Borax Company.

(Receipt of Service.)

[Endorsed]: Filed Sept. 30, 1946. [166]



[Title of District Court and Cause.]

NOTICE OF MOTION TO SET FOR TRIAL  
AND DEMAND OF PLAINTIFF FOR  
JURY TRIAL ON SPECIAL ISSUE OF  
STATUTE OF LIMITATIONS

To the Above-Entitled Court, and to Defendants  
Above-Named and to Their Respective Attorneys:

You, and each of you, Will Please Take Notice that Plaintiff above named will, upon the 21st day of October, 1946, move the above-entitled Court to set for trial the special issue of the Statute of Limitations as provided by the Order of this Court, dated September 20, 1946; and you, and each of you, will please further take notice that plaintiff above named hereby demands a trial by jury on the issue of the Statute of Limitations and as provided by said Order of this Court.

Dated: October 8, 1946.

STERLING CARR,

Attorney for Plaintiff.

[Endorsed]: Filed Oct. 9, 1946. [167]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

After hearing and argument, the form of the question to be propounded to the jury upon the special issue of the plea of the Statute of Limitations has been submitted to the Court for determination, It is therefore,

Ordered that the special issue to be submitted to the jury shall be as follows:

“At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?”

Dated: January 14, 1947.

LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed Jan. 16, 1947. [168]

District Court of the United States, Northern  
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 3rd day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,  
District Judge.

[Title of Cause.]

Minute Order of April 3, 1947

ORDER DENYING PLAINTIFF'S MOTION  
FOR A DIRECTED VERDICT, ORDER  
GRANTING DEFENDANTS' MOTION FOR  
A DIRECTED VERDICT

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. The Court having taken under advisement the respective motions of the plaintiff and the defendants for a directed verdict in favor of the plaintiff and the defendants, respectively, and due consideration having been had thereon, it is Ordered that plaintiff's motion for a directed verdict be denied and the defendants' motion for a directed verdict be granted.



[Title of District Court and Cause.]

NOTICE OF MOTION FOR DIRECTED VER-  
DICT OR IN THE ALTERNATIVE NO-  
TICE OF MOTION FOR NEW TRIAL ON  
SPECIAL ISSUE AS TO STATUTE OF  
LIMITATIONS

To the Above-Entitled Court, and to Defendants  
Above Named, and Each of Them, and to Their  
Respective Attorneys:

You, and each of you, Will Please Take Notice  
That Plaintiff above named will, and does hereby,

1. Pursuant to Rule 50(b), move that the ver-  
dict entered herein upon the 3d day of April, 1947,  
and upon and at the conclusion of the trial upon the  
special issue of the statute of limitations, be set  
aside and that the motion by plaintiff for a directed  
verdict, together with judgment thereon, be granted,  
Or in the Alternative

2. Will move, and does hereby move the above-  
entitled Court for a new trial upon the special  
issue of the statute of limitations upon the follow-  
ing grounds, to wit:

- (1) Irregularity in the proceedings of the Court.
- (2) Orders of the Court by which plaintiff was  
prevented from having a fair trial.
- (3) Insufficiency of the evidence to justify the  
verdict or the decision of the Court.
- (4) That the verdict or other decision of the  
Court is against law.
- (5) Errors in law, occurring at the trial, and  
excepted to by plaintiff.

The hearings of the above motions will be had at such time as may be fixed by the Clerk of the above-entitled Court.

Said Motions, and each of them, will be made upon the minutes of the Court. [170]

Dated: April 11, 1947.

STERLING CARR,

Attorney for Plaintiff.

(Receipt of Service.)

[Endorsed]: Filed April 12, 1947. [171]

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District Court of the United States, Northern  
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 21st day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,  
District Judge.

[Title of Cause.]

Minute Order of April 21, 1947

ORDER DENYING MOTION FOR DIRECTED  
VERDICT FOR PLAINTIFF, AND MO-  
TION FOR NEW TRIAL OF SPECIAL  
ISSUE

This cause came on regularly this day for hearing of motion for directed verdict for plaintiff; also

for hearing of motion for new trial of special issue. After hearing Sterling Carr, Esq., attorney for plaintiff, and Moses Lasky, Esq., attorney for defendants, it is Ordered that the said motions be and the same are hereby denied. [172]

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[Title of District Court and Cause.]

ORDER GRANTING MOTIONS TO DISMISS

For the reasons stated by the Court in directing a verdict upon the factual issues upon which the defense of the Statute of Limitations was based, defendants' motions to dismiss are severally granted and the cause is dismissed with costs to defendants.

Dated: May 5, 1947.

LOUIS E. GOODMAN,

United States District Court.

[Endorsed]: Filed May 6, 1947. [173]

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In the District Court of the United States for the  
Northern District of California, Southern  
Division

Civil Action No. 24948-G

BURNHAM CHEMICAL COMPANY, a Corpo-  
ration,

Plaintiff,

vs.

BORAX CONSOLIDATED, LTD., et al.,

Defendants.

JUDGMENT

Issue having been joined on the Statute of Limitations, the factual issues thereon having been tried



and a directed verdict thereon having been entered, plaintiff's motion for a new trial having been denied, and defendants' motions to dismiss having been severally granted,

It Is Hereby Ordered and Adjudged that the cause be, and it is hereby, dismissed, that plaintiff have and recover nothing from defendants or any of them, that defendants Pacific Coast Borax Company, United States Borax Company, and Borax Consolidated, Ltd., have and recover their costs from plaintiff in the sum of \$. . . . . to be taxed in the manner provided by law, and that defendant American Potash & Chemical Corporation have and recover its costs from plaintiff in the sum of \$. . . . . to be taxed in the manner provided by law.

Dated: May 9th, 1947.

LOUIS E. GOODMAN,

United States District Judge.

Approved as to form as provided in local Rule 5(d).

STERLING CARR,

Attorney for Plaintiff.

[Endorsed]: Filed and entered May 9, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER DIRECT-  
ING VERDICT IN FAVOR OF APPEL-  
LEES AND FROM ORDER DENYING A  
DIRECTED VERDICT IN FAVOR OF AP-  
PELLANT AND FROM ORDER DENYING  
NEW TRIAL

To the Above-Entitled Court and to the Clerk  
Thereof, and to defendants Borax Consolidated,  
Ltd., Pacific Coast Borax Company, United  
States Borax Company, and American Potash  
& Chemical Corporation:

Notice Is Hereby Given that Burnham Chem-  
ical [175] Company, a corporation, plaintiff above  
named, hereby appeals to the United States Cir-  
cuit Court of Appeals for the Ninth Circuit from  
the order made and entered on April 3, 1947, di-  
recting a verdict in favor of defendants Borax Con-  
solidated, Ltd., Pacific Coast Borax Company,  
United States Borax Company and American Pot-  
ash & Chemical Corporation, and further from the  
order made and entered on said April 3, 1947, deny-  
ing motion of plaintiff for a directed verdict against  
said defendants, and from the order made and en-  
tered upon the 21st day of April, 1947, denying the  
motion of plaintiff for a new trial upon the special  
issue of the Statute of Limitations.

Dated: July 1, 1947.

STERLING CARR,  
Attorney for Plaintiff.

The names and addresses of the attorneys for said appellees are as follows:

Newlin, Holley, Sandmeyer & Coleman, Esqs.,  
1020 Edison Building, Los Angeles 13, California;

Maurice E. Harrison, Esq., Moses Lasky,  
Esq., Brobeck, Phleger & Harrison, Esqs., 111  
Sutter Street, San Francisco 4, California;

Attorneys for Appellees Pacific Coast Borax  
Company, Borax Consolidated, Ltd., and  
United States Borax Company, and Oliver &  
Donnally, 110 E. 42nd Street, New York 17,  
New York; William J. Froelich, Continental  
Illinois Bank Bldg., Chicago, Illinois; Charles  
A. Beardsley, 1516 Central Bank Bldg., Oak-  
land 12, California; [176]

Philip M. Aiken, Esq., 402 Woodmen Acci-  
dent Building, Lincoln, Nebraska;

Attorneys for Defendant, American Potash &  
Chemical Corporation.

Received a copy of the within this 1st day of  
July, 1947.

BROBECK, PHLEGER &  
HARRISON,  
FITZGERALD, ABBOTT &  
BEARDSLEY.

[Endorsed]: Filed July 1, 1947. [177]



[Title of District Court and Cause]

DESIGNATION BY APPELLANT OF  
CONTENTS OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

Burnham Chemical Company, a corporation, the above named appellant, respectfully requests that the following portions of the record, proceedings and evidence be included and contained in the record on appeal, to-wit:

1. Complaint and amendment thereto of appellant, on file herein;
2. The special answers of appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company and American Potash & Chemical Corporation;
3. Memorandum Decision of said District Court on motions to dismiss, for summary judgment, and to quash for lack of venue, filed herein on the 20th day of September, 1946;
4. Pre-trial Order of the District Court dated January 16, 1947;
5. Orders of the District Court made upon the 3rd day of April, 1947, granting the motion of appellees for a directed verdict and denying the motion of appellant for a directed verdict;
6. Notice of motion of appellant for a new trial on special issue of Statute of Limitations and motion for directed verdict;

7. Order of said District Court denying the motion of appellant for new trial, made upon April 21, 1947;
8. Reporter's transcript of the evidence given and offered on the trial of said cause upon the special issue of the Statute of Limitations;
9. Notice of appeal of appellant herein;
10. Statement of points upon which appellant intends to rely on appeal;
11. This designation of contents of record on appeal.

Dated this 1st day of July, 1947.

STERLING CARR,

Attorney for Appellant.

Received a copy of the within this 1st day of July, 1947.

BROBECK, PHLEGER &  
HARRISON,  
FITZGERALD, ABBOTT, &  
BEARDSLEY.

[Endorsed]: Filed July 1, 1947. [179]

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[Title of District Court and Cause]

STATEMENTS OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL PURSUANT TO RULE 75D  
FEDERAL RULES OF PROCEDURE.

Now comes Burnham Chemical Company, a corporation, the appellant above named, and pursuant

to Rule 75D of the Federal Rules of Civil Procedure, sets forth a statement of the points upon which appellant intends to rely on appeal, as follows:

1. The District Court erred in denying, upon April 3, 1947, appellant's motion for a directed verdict in its favor and against appellees upon the trial of the special issue of the Statute of Limitations;

2. The District Court erred in granting, upon April 3, 1947, the motion of said appellees above named for a directed verdict against appellant and in the making of the order directing such verdict in favor of appellees;

3. The District Court erred in making its pre-trial order upon the 16th day of January, 1947, that the special issue to be submitted to the jury would be as follows:

“At any time from May 17, 1929 to October 10, 1939 did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?”

4. The District Court erred in stating, upon the 27th day of March, 1947, to the jury empaneled for the trial of the special issue of the Statute of Limitations, the following:

“A question was raised preliminarily as to whether or not this suit was brought within the time specified by law. That is a legal question for the court to determine. However, in



order to aid the court in the determination of that question, the court made an order that a certain question of fact should be determined by the jury. The order that the court made was that the following issue was to be submitted to the jury, and I am quoting now from the court's order:

“ ‘At any time from May 17, 1929, to October 10, 1939, did the plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?’ ”

5. The District Court erred in stating to said jury at said time and place that the issue to be submitted to said jury was: [181]

“At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?”

6. The District Court erred in instructing, as aforesaid, the said jury above referred to and at the time and place hereinabove referred to, at the commencement of the trial of said action and before the introduction of any evidence therein;

7. The District Court erred in taking the said case from the jury and not allowing said jury to pass on the question as given to it at the commencement of said trial by said court, as above set forth;

8. The District Court erred in not submitting the case to said jury;

9. The District Court erred in refusing the request of the attorney for said appellant to read to the jury on the trial of said action the complaint of appellant, and amendment thereto, on file herein;

10. The District Court erred in sustaining the objection of appellees to the introduction by appellant of the evidence offered by or through the witness William Arthur Gauge;

11. The District Court erred in denying, upon April 21, 1947, the motion of appellant herein for a new trial upon the special issue of the Statute of Limitations.

Dated the 1st day of July, 1947.

STERLING CARR,

Attorney for Appellant.

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed July 1, 1947. [182]

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[Title of District Court and Cause]

COUNTER-DESIGNATION BY APPELLEES  
BORAX CONSOLIDATED, LTD., PACIFIC  
COAST BORAX COMPANY, UNITED  
STATES BORAX COMPANY, AND AMER-  
ICAN POTASH & CHEMICAL CORPORA-  
TION OF CONTENTS OF RECORD ON  
APPEAL PURSUANT TO RULE 75 OF  
THE RULES OF CIVIL PROCEDURE

The appellees, Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Com-

pany, and American Potash and Chemical Corporation, each acting for itself, hereby designate the following portions of the record, proceedings and evidence, in addition to those designated by the appellant, to be contained in the record on appeal in this action, taken by appellant on July 1, 1947:

1. The "Motion of defendant Pacific Coast Borax Company to dismiss for failure to state a claim on which relief may be granted, to dismiss because the action is barred by the Statute of Limitations, and to strike," filed herein on or about October 29, 1945.

2. "Motions of defendant United States Borax Company to quash service of summons and to dismiss for improper venue and for lack of jurisdiction over the person of defendant, to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the Statute of Limitations and to strike," filed herein on or about October 29, 1945.

3. "Affidavit of Moses Lasky in support of motions to dismiss filed by United States Borax Company and defendant Pacific Coast Borax Company," filed herein on or about October 29, 1945, including all the exhibits annexed to said affidavit; provided, however, that in order to avoid duplication pursuant to Rule 75(e) of the Rules of Civil Procedure, Exhibit 1 attached to said affidavit may be omitted upon the insertion of a statement in the record that said exhibit is identical with Defendants' Exhibit C introduced at the trial of the special issue; Exhibit 3 attached to said affidavit may [183]



be omitted upon the insertion of a statement in the record that it is identical with Defendants' Exhibit P introduced at the said trial.

4. "American Potash & Chemical Corporation's amended motions to dismiss the action and to strike parts of the complaint," filed herein on or about November 27, 1945.

5. "Notice of motions of defendant Borax Consolidated, Ltd., to dismiss for failure to state a claim on which relief may be granted, to dismiss because the action is barred by the Statute of Limitations, and to strike," filed herein on November 23, 1945.

6. "Stipulations re motions of defendants," filed herein on December 4, 1945.

7. "Further Affidavit of Moses Lasky in support of defendants' motions to dismiss and for a summary judgment," filed herein on January 29, 1946, including the exhibits attached to said affidavit; provided, however, that in order to avoid duplication Exhibit A attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit U introduced at the trial of the special issue; Exhibit B attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit V introduced at said trial.

8. "Affidavit of Philip M. Aitken in support of amended motions to dismiss filed by American Potash & Chemical Corporation and motion for summary judgment," filed herein on or about February 7, 1946, including the exhibits attached to said

affidavit; provided that said exhibits may be omitted upon insertion in the record of a statement that Exhibit 1 thereto is identical with Defendants' Exhibit M introduced in evidence at the trial of the special issue, that Exhibit 2 thereto is identical with Defendants' Exhibit N introduced in evidence at said trial and that Exhibit 3 thereto is identical with Defendants' Exhibit AF introduced at said trial.

9. "Stipulation," filed on or about January 15, 1946 [184]

10. "Affidavit of George B. Burnham on behalf of plaintiff and in reply to affidavits filed by defendants in support of their motions for summary judgment and to dismiss and to strike out," filed herein about February 20, 1946.

11. "Affidavit of F. M. Jenifer in support of defendants' motions to dismiss and for a summary judgment," filed herein on January 29, 1946.

12. "Reply Affidavit of Moses Lasky in support of defendants' motions to dismiss and for a summary judgment," filed herein on March 6, 1946, including the exhibits attached to said affidavit; provided, however, that in order to avoid duplication Exhibit A attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit J introduced at the trial of said special issue; Exhibit B attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit K introduced at said trial; Exhibit C attached to said affidavit may be omitted upon insertion of a statement in the

record that it is identical with Defendants' Exhibit L introduced at said trial; Exhibit D attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit R introduced at the trial; Exhibit E attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit S introduced at the said trial; Exhibit G attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit A introduced at said trial; Exhibit H attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit H introduced at said trial; Exhibit I attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit Z introduced at said trial.

13. "Supplemental Affidavit of George B. Burnham," filed herein about March 9, 1946. [185]

14. Plaintiff's "Notice of motion to set for trial and demand of plaintiff for jury trial on special issue of statute of limitations," filed herein about October 8, 1946.

15. Reporter's transcript of proceedings at pre-trial conference on December 2, 1946, and January 16, 1947.

16. Reporter's transcript of argument of plaintiff's counsel on motion to dismiss on December 5, 1945.

17. Reporter's transcript of all proceedings occurring at the trial of the special issue on March



26, 27 and 28, 1947, and April 1, 2 and 3, 1947, if the same is not otherwise included in the transcript prepared pursuant to appellant's designation of "Reporter's Transcript of the Evidence Given and Offered on the Trial" in appellant's designation of contents of record on appeal, including copy of decision of the Department of the Interior January 22, 1947, and copy of decision of the Department of the Interior February 24, 1947, both in the matter of Burnham Chemical Company, Los Angeles 045676, 046681, received in evidence April 3, 1947.

18. This Counter-Designation.

Dated: July 10, 1947.

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER &  
HARRISON,

/s/ PAUL SANDMEYER,

NEWLIN, HOLLEY,

SANDMEYER & COLEMAN,

Attorneys for defendants Borax Consolidated, Ltd.,  
Pacific Coast Borax Company and United  
States Borax Company.

OLIVER & DONNALLY, [186]

/s/ WILLIAM J. FROELICH,

/s/ CHARLES A. BEARDSLEY,

/s/ PHILIP M. AITKEN,

Attorneys for defendant  
American Potash & Chem-  
ical Corporation.

(Receipt of Service)

[Endorsed]: Filed July 10, 1947. [187]

[Title of District Court and Cause]

STIPULATION RE RECORD ON APPEAL

Whereas, upon the 1st day of July, 1947, appellant above named appealed to the United States Circuit Court of Appeals for the Ninth Circuit from certain orders and rulings set forth in appellant's notice of appeal, hereby referred to, and at said time filed its designation of the contents of the record on appeal; and

Whereas, upon the 10th day of July, 1947, appellees above named filed their counter-designation of additional portions of the record, proceedings and documents to be included in the record on appeal.

Now, therefor, it is stipulated by the parties hereto as follows, to-wit:

1. Time for filing the record on the said appeal taken by appellant, as aforesaid, in the appellate court and docketing the cause there is hereby extended to and including September 14, 1947.

Dated: July 19th, 1947.

STERLING CARR,  
Attorney for Plaintiff and  
Appellant.

BROBECK, PHELGER &  
HARRISON,  
MAURICE E. HARRISON,  
MOSES LASKY,  
NEWLIN, HOLLEY,  
SANDMEYER & COLEMAN,  
PAUL SANDMEYER,  
Attorneys for Defendants and Appellees, Borax  
Consolidated, Ltd., Pacific Coast Borax Com-  
pany, United States Borax Company.

OLIVER & DONNALLY,  
WILLIAM J. FROELICH,  
CHARLES A. BEARDSLEY,  
PHILIP M. AITKEN,  
Attorneys for Defendant and Appellee American  
Potash & Chemical Corporation.

It is so ordered:

LOUIS E. GOODMAN,  
United States District Judge.

Dated: July 24, 1947.

[Endorsed]: Filed July 25, 1947. [188]



[Title of District Court and Cause]

NOTICE OF APPEAL FROM ORDER GRANTING MOTIONS OF DEFENDANTS TO DISMISS AND FILED HEREIN ON MAY 6, 1947; ALSO NOTICE OF APPEAL FROM THE JUDGMENT ENTERED IN THE ABOVE ENTITLED ACTION ON OR ABOUT MAY 8, 1947

To the Above Entitled Court and to the Clerk Thereof, and to Defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, and American Potash & Chemical Corporation:

Notice is hereby given that Burnham Chemical Company, a corporation plaintiff and appellant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from—

- (a) The order made and entered in the above-entitled action on the 6th day of May, 1947, granting the motion of defendants and appellees herein to dismiss the above-entitled action;

And further from—

- (b) The judgment entered by the above-entitled Court in the above-entitled action on the 8th day of May, 1947.

Dated: August 2nd, 1947.

STERLING CARR,

Attorney for Plaintiff and  
Appellant.

Names and address of the attorneys for said appellees are as before noted.

[Endorsed]: Filed August 2, 1947. [189]

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF CONTENTS OF RECORD ON APPEAL FROM ORDER DISMISSING ACTION, AND FROM JUDGMENT, AND FROM ORDER DENYING NEW TRIAL

To the Clerk of the above-entitled Court:

Burnham Chemical Company, a corporation, the above-named appellant, respectfully requests that the following portions of the record, proceedings and evidence in the above-entitled action be included and contained in the record on appeal to wit: [190]

1. All of those documents requested in the designation by appellant of contents of record on appeal filed herein on July 1, 1947, Provided that only one set of said documents—eleven (11) in number—need be supplied for said record.
2. Notice of Motion for directed verdict and for new trial.
3. Order of Court denying the above motions.
4. Portions of the record designated in the Counter-designation by appellees on appeal heretofore taken on July 1, 1947, and which counter-designation was filed herein on or about the 10th day of July, 1947.
5. This designation.

All of the above, provided, however, that no more than one of any of the documents referred to in

this designation or in the prior designation referring to the first appeal taken herein on July 1, 1947, or in the counter-designation by appellees filed herein on or about the 10th day of July, 1947, be included in the records on appeal from the said two appeals taken herein.

Furthermore, the records on both of said appeals shall be consolidated so as to form one record on both of said appeals taken herein, and as required by the Rules of Federal Procedure.

Dated: August 2nd, 1947.

STERLING CARR,  
Attorney for Plaintiff and  
Appellant.

[Endorsed]: Filed Aug. 2, 1947. [191]

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[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
THE APPEAL TAKEN FROM THE  
ORDER GRANTING THE MOTION TO  
DISMISS AND FROM THE JUDGMENT  
ENTERED IN THE ABOVE-ENTITLED  
ACTION

Now comes Burnham Chemical Company, a corporation, the Plaintiff and Appellant above named, and pursuant to Rule 75(d) of the Federal Rules of Civil Procedure sets forth a statement of the



points upon which appellant intends to rely on appeal as follows: [192]

1. The District Court erred in granting upon May 6, 1947, defendants and appellees' motion to dismiss the above-entitled cause.

2. The District Court erred in rendering judgment in the above-entitled action on May 8, 1947, in favor of defendants and appellees and against plaintiff and appellant.

3. The District Court erred in making its pre-trial order upon the 16th day of January, 1947, that the special issue to be submitted to the jury would be as follows:

“At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?”

4. The District Court erred in holding upon the 6th day of May, 1947, that the conspiracy charged in the complaint on file herein was not a continuing conspiracy.

5. The District Court erred in holding upon the 6th day of May, 1947, that the cause of action set forth in the complaint on file herein was barred by the statute of limitations.

6. The District Court erred in denying upon April 21, 1947, plaintiff and appellant's motions for a directed verdict and for a new trial on the question of the statute of limitations.

Dated this 2nd day of August, 1947.

/s/ STERLING CARR,

Attorney for Plaintiff and  
Appellant.

Received a copy of the within this 1 day of July,  
1947.

BROBECK, PHLEGER &  
HARRISON,  
FITZGERALD, ABBOTT &  
BEARDSLEY.

[Endorsed]: Filed ~~July 1~~, 1947. [193]

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[Title of District Court and Cause.]

COUNTER-DESIGNATION BY APPELLEES  
BORAX CONSOLIDATED, LTD., PACIFIC  
COAST BORAX COMPANY, UNITED  
STATES BORAX COMPANY, AND  
AMERICAN POTASH & CHEMICAL COR-  
PORATION OF CONTENTS OF RECORD  
ON APPEAL PURSUANT TO RULE 75  
OF THE RULES OF CIVIL PROCEDURE

The appellees, Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, and American Potash and Chemical Corporation, each acting for itself, hereby designate the following portions of the record, proceedings and evidence, in addition to those designated by the appellant, to be contained in the record on appeal in this action, taken, by appellant on August 2, 1947:

1. Order of Court granting defendants'

motions to dismiss, filed herein on or about May 6, 1947.

2. Judgment filed herein on or about May 9, 1947.

3. Affidavit of J. C. Lynch in support of Motion to Dismiss and for Summary Judgment filed on January 29, 1946.

4. Affidavit of S. M. Nelson in support of Motion of Defendant United States Borax Company to Dismiss (and exhibits attached thereto) filed on October 29, 1945.

5. This Counter-Designation.

Dated August 26, 1947.

MAURICE E. HARRISON,  
MOSES LASKY,  
BROBECK, PHLEGER &  
HARRISON,  
PAUL SANDMEYER,  
NEWLIN, HOLLEY,  
SANDMEYER & COLEMAN,  
Attorneys for defendants Borax Consolidated, Ltd.,  
Pacific Coast Borax Company and United  
States Borax Company. [194]

OLIVER & DONNALLY,  
WILLIAM J. FROELICH,  
CHARLES A. BEARDSLEY,  
PHILIP M. AITKEN,

Attorneys for defendant  
American Potash &  
Chemical Corporation.

[Receipt of service.]

[Endorsed]: Filed Aug. 27, 1947. [195]



[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefore, it is hereby Ordered that the Appellant herein may have to and including October 21, 1947, to file the Record of Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated September 11, 1947.

LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed Sept. 11, 1947. [196]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TO  
TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 196 pages, numbered from 1 to 196, inclusive, contain a full, true and correct transcript of the records and proceedings in the matter of Burnham Chemical Company, a corporation, Plaintiff, vs. Borax Consolidated, Ltd., et al., Defendants, No. 24948G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of \$56.50 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 9th day of October, A.D. 1947.

[Seal]

C. W. CALBREATH,

Clerk.

/s/ M. E. VAN BUREN,

Deputy Clerk. [197]

In the District Court of the United States for the  
Northern District of California, Southern  
Division.

Before: Hon. Louis E. Goodman,  
Judge.

No. 24948-G

BURNHAM CHEMICAL COMPANY,

Plaintiff,

vs.

BORAX CONSOLIDATED, LTD., et al.,

Defendants.

REPORTER'S TRANSCRIPT

December 5, 1945

Argument of Sterling Carr, Esq.

Mr. Carr: May it please the Court, in the zeal of counsel who last spoke to be successful in this

litigation, he has attempted, we respectfully say to your Honor, to try this case once and for all right here by word of mouth through the statements he makes as to the facts in various situations. He has tried to conclude this case once and for all by statements which he has made, and in doing so he has called most largely on the Reno case. He has stated in part the facts there, but not all of them, and while we contend that that case has absolutely no relevancy to the present motion and that they cannot go and seek that case or any statements made in any of the pleadings or affidavits in that connection in support of their motions here, counsel has gone so very wide afield that probably in justice to our people we should state some of the real facts in that situation, and as to the issuance of the judgment.

The action was brought up there, the fraud order was issued, not for the sale of the stock, but because it was claimed by the Department that this solar process of Mr. Burnham was not workable and would not work out. Then Mr. Burnham, through his company, filed his complaint and many affidavits were filed in that proceeding when it finally got to hearing. It dragged and dragged up there for various causes over a good many years, and finally when they did get it to trial Judge Norcross, after some days of argument, granted the injunction and restrained the postmaster at Reno and the Postmaster General from operations under the so-called fraud order.



Then the matter was set down by Judge Norcross in January. The trial was set for the following April. At that time, or shortly before the date set, the matter was continued by consent, and, as I read the record up there, there was something like sixty-odd continuances granted, not for ten days or so, but they would be granted for the term of the court, or a certain period. Those are all of record there; so the continuances were all had by the mutual consents of the parties.

Finally, one day, and without any notice whatsoever to the plaintiff in that action, or without any knowledge on the part of anybody, Judge Norcross took his seat on the bench and dismissed the cause for lack of prosecution, after all of these continuances had been had by the consent of the parties. I think the order reads, "The District Attorney—" that was Mr. Atkinson, up there, who was the District Attorney at that time, and who was in court—"The District Attorney making no opposition, this matter was dismissed for lack of prosecution."

The plaintiff did not know anything about that action, and never heard of it until a long time afterwards. Shortly thereafter, we contend and will show on the trial of this case, that fraud order was reinstated at the instigation of some of these gentlemen who are now trying to escape their wrongdoing. I might also state that efforts are now being made to have that removed, but Mr. Burnham at that time did nothing at the moment, because he was without funds. He was disheartened. He was down. He was pretty nearly licked.

In addition, Frank Heney, one of his attorneys, was very sick, or had gone on the bench, and the matter dragged until it finally came into this court. The statements we contend made in that matter do not in any respect bear out Mr. Lasky's contentions here that the objections were made on the ground of the formations of the conspiracies alleged herein. The facts, if we ever get to that, will show just to the contrary. The facts will show that the wrongs inflicted upon these people all during this period and with that fraud order was without authority or basis, whatsoever. Some of the finest and greatest engineers in this country filed affidavits in that proceeding as to the practicability and efficiency of this particular system which Mr. Burnham devolved, and we will show that even some of these defendants used or attempted to use that same process until they finally backed away, not, however, from any defect in the process, itself, but because they were fearful of their activities and what might result therefrom.

We contend, as I said, that the Nevada situation has absolutely no relevance to this, at all, that this complaint must be adjudged on its face, and if we have stated a cause of action under the Antitrust Laws, irrespective of what the facts might be as to what was contained in these various complaints and affidavits in Nevada, which is immaterial, if the complaint here states a cause of action, that is sufficient for purposes of this motion. We do not want to lose sight of the fact that every one of the allegations of this complaint are admitted.

We charge them with fraud and various other activities, all of which, for the purposes of this motion, are admitted. If your Honor should deem it proper that the motion should be overruled, they are not without right, for they then come in and plead the statute, and under the authorities we can have a separate trial first as to the statute and its applicability, and of course that must be true. In our memorandum we cited authorities directly to that point. On such trial we are ready to meet them, and we invite such a plea on their part, because it will open up many, many interesting facts. That is the way this situation, if it has any effect at all, should be reached, by separate trial. It has been done in other cases, as is apparent from our memo. But we say for purposes of this motion they have absolutely no right to raise the factual issue as to whether or not we had knowledge or were put on notice, whether or not the facts existing as alleged by them really did exist. You can't try the statute of limitations by affidavits or casual statements of counsel in the argument. The questions raised are questions of fact, and would have to have much evidence on both sides in order for a proper determination.

In addition we believe, as set forth in our memo, it is very questionable whether the question of the statute of limitations as a factual situation could be raised in this way. The New Rules provide that the statute shall be raised by a responsive plea. We have cited that rule, and your Honor will see that it provides that is the way to raise the statute. We



recognize and admit that if the complaint is so barren of any fact so as to bring the case within the statute, and it appears apparent right on the face of the complaint that there is no cause of action stated, then, of course, the plea would be proper; that is, on the ground of lack of sufficient allegations, and not alone on the ground of the statute.

The Court: As I recall, there is a proposed amendment for a revamping of the rule in the pamphlet that I received, to endeavor to eliminate the so-called speaking motions for dismissals, but to confine that type of motion to motions for summary judgment where, if there is no factual issue, the court may enter judgment in favor of one party or another, although there are cases which hold—and I have quoted them myself and used them in decisions—ratifying the procedure of speaking motions to dismiss. But those who have been working on the rules seem to think that where dismissal is sought in the pleadings stage, the grounds being the failure to state a cause of action, a speaking motion is improper, and that should only be invoked in the case of a motion for summary judgment.

Mr. Carr: Thank you, your Honor.

The Court: I do not know whether that is going to be adopted by the Supreme Court, or not, but I noticed it is being presented as a proposed amendment.

Mr. Carr: It is impossible to answer all the cases or authorities cited by counsel. They have been most diligent in their research and they have given to their clients the very best that is possible within them. They have cited many, many authorities,

many of which we believe have no applicability. But of course, you can find comforting words in every situation. If you can't find them in one case, you can take a paragraph from another case, lending very easy reading to the parties desiring to argue that way, and we think, with all due respect, counsel's brief is largely made up of such citations. They hope for the best, and they find some quotations that might give them some courage to advance such a thought. But listening to the arguments, one would believe we were suing for damages for each specific overt act, rather than under the statutory actions for treble damage suits. You would think that they attack each one of those overt acts and try to show not only their inapplicability due to the statute, but how it could not have happened, how we guessed wrong, and various other things. They are trying again the facts out on this particular motion. They seem to have lost sight of the fact that this action arises under section 15, Title 15. Judge Caffrey said, in his opinion in the Aluminum case, the long one in New York, that such an action as this originally laid in common law, and there was some common law applicability of it. I think that might be in a little doubt, but anyhow this right of action is purely statutory now. It was created, so far as we are concerned, in this particular statute, and the statute reads:

“Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust Laws, may sue therefor in any district court in the United States,” and so forth, “in the district.”

Now, what does that mean? By reason of anything forbidden in the Antitrust Law? Well, when we turn to the section on combination in restraint of trade:

“Any contract, combination in the form of trust or otherwise, conspiracy in restraint \* \* \* is hereby declared to be illegal.”

Any injury that will grow out of that combination or contract or conspiracy will give cause for a right of action by the party injured.

Section 2 is the monopoly section:

“Every person who shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any trade among the several States is guilty.”

Therefore the rights granted here grow out of those particular combinations, either in restraint or to monopolize. They do not grow out of the overt acts committed in support thereof. And that, I think, must have been the very thought your Honor had in mind yesterday as to the discovery of the conspiracy. It is the conspiracy in this class of case that gives the basis for the cause of action. The overt acts are merely the facts of damage, the statement as to damage, what damage has been suffered and will be in a measure the measure of damages and not the basis of the action, itself. The real basis of the action is that we have been injured under the Antitrust Laws. Now, those Antitrust Laws forbid the conspiracy, and everybody who



combines, everything they do in contemplation of or pursuant to one of those conspiracies is actionable, providing the damage is suffered by the plaintiff in the proceeding.

The Court: Would this be a convenient time for you to stop?

Mr. Carr: Certainly, your Honor.

The Court: I know you probably just got started. I think we had better take the recess at this time.

### Afternoon Session

Mr. Carr: If it please your Honor, at the noon recess we were referring to section 15, and we made the statement that no action under the Antitrust Acts, as this is, can be had unless a conspiracy exists. The conspiracy to monopolize is the basis of the action under such section 15, so the conspiracy in this case, unlike conspiracies in other actions, is really the basis of a situation of this character, and the overt acts are but the measures in a sense of the damages which have been suffered by the plaintiff, if he has suffered through these conspiracies. Any thing done under this conspiracy or confederation which injures a plaintiff constitutes an overt act, and those overt acts combined will be the measure and basis of the judgment that plaintiff might recover.

We believe that the statute of limitations does not begin to run until the last overt act. As long as the conspiracy is continuing, and the injury is

continually being done to the plaintiff, we believe the statute has no application.

I find I left out of my memo three cases which should have gone in there, but were omitted from the memorandum in the hurry of preparation. I would like to leave them with your Honor. I think this case of *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 73 Fed. (2d) 333, Sixth Circuit, in which certiorari was denied, is most applicable. There it was said in the opinion:

“There remains to be determined the question as to when the statute of limitations to run against an action for conspiracy. It is the contention of the plaintiff that a conspiracy, until successful or terminated, is a continuing wrong, and that, so long as damages flow, and this without regard to the time of formation or the commission of overt acts, the statute does not begin to run. Reliance is placed upon *United States vs. Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168; *Patterson vs. United States*, 222 Fed. 599 (C. C. A. 6), and *Eldredge vs. United States*, 62 Fed. (2d) 449, 450. These decisions do not sustain the plaintiff’s contention. They go no further than to hold that a conspiracy continues so long as overt acts are being committed by one or more of the conspirators, even though there is no new agreement among them subsequent to the original agreement. This is made clear by the language of Mr. Justice Holmes in the *Kissel* case at pages

607, 608 of 218 U. S.: 'A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act,' and by the comment of the court in the Eldredge case: 'The overt act is an essential ingredient of the crime; a conspiracy which contemplates a series of overt acts is a continuing conspiracy, and the statute does not commence to run until the last overt act, performed in compliance with the original agreement, has been accomplished.' Since in the Eldredge case overt acts in furtherance of a conspiracy charge were proven to have been committed within a few months of the indictment, it was held that such acts were the acts of members of the conspiracy."

We believe, your Honor, that that states the actual law, and we do not agree with counsel in the statement that the Kissel case, which is probably the leading case on the question of a continuing conspiracy, is applicable only to criminal law. There is nothing in that case which so holds, and so far as we have been able to find out—and we have looked—I find no case at all which so holds, that is, which confines the Kissel case only to criminal situations. True, in some situations the Kissel case is referred to as a criminal case, but you will find that most of those cases where that comment is made, if not all of them, they go back and cite the Foster & Kleiser case. In reference to that



particular case, which has been relied upon and which, I think, is their principal authority, when that case is carefully read it will be determined that all the language in that case about the Kissel case on these various other points raised was mere dicta, for in that case there could have been no possible chance of recovery, and the court in writing that opinion must have had that fact in mind and moved solely along that line, because while the court does not hold that subdivision (4) of 338, the fraud and the concealment provision, is not applicable to situations of this character, it goes on to say in that particular case it could not be called upon because the defendant had admitted to the plaintiff that he was trying to put him out of business. That is far afield from the present case, where the contrary is the fact. The defendants here, through their agent and representative denied, when charged by Burnham with that fact, denied—and let me say here that he did not, as Mr. Lasky contends, go to Zabriskie and say that he was charging him with the formation of a conspiracy; that was not the fact—what the plaintiff alleges in the complaint is that he went and charged him with being responsible for those price cuts and put them out of business. Now, Zabriskie denied that, and plaintiff, taking him by his word, went his way on the situation. And so we say that the Foster & Kleiser case does not go to the extent charged or called upon by the defendants. It is put solely upon the ground that the statement was made, and therefore the application of sub-

division (4) was not proper, could not be made, and they had to go back to subdivision (1), the straight three-year statute, because facts were introduced which showed knowledge on the part of the defendants and an admission by the defendants of their wicked attempts.

Here, as I said, we have alleged the formation of the conspiracy, which is the basis of our action in this particular class of case, and particularly here. We allege that the conspiracy was formed not only in 1929 but prior to that time, and we allege that in 1929 it was reduced to a contract. They made a formal contract instead of allowing it to rest in letters and exchanges of confidences existing prior to that time, but they put it into writing in 1929, and then subsequently followed it with another contract made in this city in the form of letters and other things subsequently, in which they took in some other victims whom they wished to get out of the way. So the basis of our action lies, as I have said, in the conspiracy formed. That is the cause of action which really forms our cause of action.

The Court: Is it your contention, Mr. Carr, that plaintiff was put out of business in 1929 as a result of an unlawful conspiracy and that the statute does not run as long as the conspiracy continues to be in effect?

Mr. Carr: No, I do not go that far. My idea would be that it would run from the last overt act.

The Court: What do you allege in the complaint to be the last overt act?

Mr. Carr: The Little Placer claim. They have studiously avoided any discussion of the Little Placer claim until this morning, and then Mr. Lasky comes in with a motion to strike it out; it has no applicability. We could not prove any damages from it, but we make a live issue of that thing in the complaint. Beginning with paragraph 77 on page 36 we start in a story of the Little Placer claim. In paragraph 77 we approach it historically. There were, as a matter of fact, only 10 acres in this Little Placer Claim. It was the one, the only outstanding Kernite deposit that was known to exist in the world, and we had made our application. Counsel was right this morning in describing the two methods of acquisition, either by a mineral claim or by a lease, and the Government held that it was at one time subject to a lease. Now, we made application first on the land and our lease was turned down as a matter of law. Subsequently we went through various divisions of the Department of the Interior, and when we got to the head we finally won out completely, and the defendants, here, who were applying, were put out of court, leaving the claim wide open, which we believe was subject to our application which we had in, and on page 37 we set forth, we state:

“That the facts of said endeavor of plaintiff to secure said lease upon said ‘Little Placer’, and the opposition of defendants thereto, is as follows:”

Now, the defendants pursued us wherever we went in search of land or property, including this



Little Placer claim, particularly because of its very valuable possibility to the thing, and not only possibility, but a very valuable asset, because, as I have said, it was the last known and the only known held property in which the Kernite could be produced. The defendants held complete monopolization. They endeavored to keep us out of the Little Placer with further activity on their part, in the performance of their monopoly which they had. Then we go on in paragraph 78 to give some further account of our activity, and we say:

“As set forth in paragraph 71 of this complaint, the defendants, Borax Consolidated, Ltd., and Pacific Coast Borax Company, have controlled since 1934, and now control, all of the world's known Kernite deposits except 10 acres thereof, known as the Little Placer claim. Ever since June of the year 1928 plaintiff has been endeavoring to secure a lease from the said United States Government upon said Little Placer under and by virtue of the laws appertaining thereto, but all of such endeavors of plaintiff have been contested, fought and blocked by the actions of the defendants herein in pursuance to the said unlawful plan and conspiracies of said defendant to own, control and market all borax in all its forms and products, in all the world, and to prevent competition therein, and to that end, to drive plaintiff from all activities and business in the field of borax at its ownership, production and sale.”

Then we set forth, as I say, the various acts, not only of ourselves, but of the defendants, and go on to show that our application for this particular lease is still pending, and the defendants, after this defeat before the Department of the Interior, applied for a writ of mandamus in the District Court of the District of Columbia to force the Secretary to give to them this lease that they claimed.

Another illustration contrary to that cited by counsel this morning to the effect that you could not reach that matter in court by legal proceedings, and that the matter rested wholly within their discretion is that while that action was pending for the writ of mandamus, the Government brought on for trial its action here before your Honor, and there the defendants charged stood up and admitted their wickedness and their guilt——

Mr. Harrison: You do not mind if I interrupt again?

Mr. Carr: Not at all. I expected it.

Mr. Harrison: There was an express statement in the decree that we admitted nothing, your Honor.

Mr. Carr: That is an anacronism. You cannot say you admitted nothing. This question is going to come all through this matter. I do not say that those judgments in that particular case constituted prima facie evidence, and that is the only thing that the court says they will not constitute, but that does not prevent us from calling upon that judgment in that case as an admission. It is ridiculous, and

it never could be held that people coming in here and paying \$140,000 and saying, "I never did it at all"—if that was true and they had never been guilty and were not pleading in fact guilty to the charges made, the court would have had no jurisdiction. It would have had to throw the case out. The court could never have levied the fine. We do not contend, as I say, that any of those judgments, either in the civil or in the criminal case, are prima facie evidence, but we do say that it is evidence of admission of guilty, and you can't get away from that no matter what you put in the judgments.

Mr. Lasky: You overlooked the cases we cite.

Mr. Carr: Oh, yes, but they do not go that far. You picked out a few little words here and there, but they do say they cannot be used as conclusive proof of the charges made, which we admit, but we do say that they do constitute admissions just like if I had met these people on the street and said, "Here you are charged with these crimes and with these misdemeanors and these acts," and they said, "Yes, we did it. We are guilty, but we thought we could get by with them." Then they come into court and enter a plea of nolo contendee, which is a sort of polite plea—that is about the best you can say about it. It is worse than a Scotch verdict—"Not guilty but don't do it again." It is a confession. You can't get away from it, no matter what you put in your judgment here that they do not confess anything. If they did not confess it, how could the courts have levied the fine? You can never contend, in the face of the charges made,



that it is a voluntary payment. They came in here and admitted those allegations. They have got to in order to save their hide. They know what might happen to them if the court did not take it. These consent decrees are simply a consent to a decree being entered against them in the matter, and then is is customary to go on and say, "Well, we do not admit anything. We are not guilty of anything, but we are going to pay you \$140,000, or whatever the court says we must pay."

There can be no question as to that. I will be glad to meet you on that when the time comes. I think there are plenty of cases and sound reasoning on that, and the statute, itself, only says it shall not be prima facie evidence, which is all right, but that does not say that they are not admissions of guilt, and that is exactly what occurred here.

Now, with respect to the Little Placer, we go on to say:

"That all of the above acts done and performed by defendants, or some of them, have been pursuant to and in furtherance of said conspiracies, plans and combinations hereinbefore in this complaint set forth and described with the intent and purpose of controlling and dominating, throughout the world and in interstate commerce, the mining, production and sale of borax in all its various forms and products, and with the intent and purpose of injuring and destroying plaintiff's activities as herein set forth and removing plaintiff as a competitor of defendants, or some of them, in

the said mining, production and the sale of borax in all of its forms; that due to said intents, purposes, and acts of defendants, plaintiff has been damaged," and so forth.

That is a complete tie-in, a complete overt act. Nothing could be a stronger overt act than the activities of these defendants throughout this whole proceeding.

And remember, may it please your Honor, so far as this motion is concerned, those are all admitted facts, that they did all of these things just as alleged in the complaint, and we cannot say that that is not an overt act. Some contention was made that because we might not be able to recover damages by reason of their activities—true, we cannot for this particular overt act, unless we can show actual damage, but that comes on the trial of the case and not on a motion to dismiss, where the statute is the main ground for their motion. That is factual and not legal to the extent we are considering today.

The Court: Your client could have continued on in this business after 1929 without this Little Placer claim, could he not, in the absence of the alleged activity of the defendants?

Mr. Carr: No, your Honor; as a matter of fact, when we were put out of business by the price cuts in 1929 we still had our plant, and we hung on and tried to make the thing go. We were trying to get this Little Placer. If we could have had the Little Placer we could have secured Kernite and we could have produced it somewhat on a comparable basis

with the defendants, if we were not run out of business otherwise some way or other, but that would have given us a chance. We still own it. It is not alleged in the complaint as to the year, but we do say——

The Court: I think you are referring to page 36.

Mr. Carr: Maybe that is it, your Honor. It states, “And thereafter plaintiff struggled on as best it could to survive, but ultimately it was obliged to default in the payment of its rentals due under such Searles Lake lease.”

We had one of those leases there and could not pay under it.

“——with the result that the United States of America, as lessor, canceled said lease and retook possession of said lands and buildings permanent installations thereon; that thereafter certain stockholders of plaintiff, in an endeavor to save the situation, applied to said United States Government for a lease upon said premises and equipment; said application was subsequently denied, and thereafter said lease and improvements were offered for bid, at which time defendants, American Potash & Chemical Company, bid for said lease and was given the same for the sum of approximately \$130,000; (said lease contained certain additional land.)”

The Court: Let me interrupt you again.

Mr. Carr: Yes, certainly, any time.

The Court: I am trying to get your point clear in my mind. Assuming, as you have alleged, the



plaintiff was forced out of business, and, as the plaintiff alleges, the plant and business of the plaintiff was shut down in January, 1929——

Mr. Carr: Yes.

The Court: And thereafter he tried to keep his lease on the source of supply in good standing, but because the business was shut down and he did not have any money he was unable to keep that in good standing. I think that is a fair inference.

Mr. Carr That is correct.

The Court: So from time to time he besought the Government to keep that lease in good standing for him.

Mr. Carr: Yes, your Honor.

The Court: Because his business was closed down, or he could not get the money to do that, he was ultimately unsuccessful in maintaining that. Where is the overt act of the defendant that has to do with that?

Mr. Carr: The overt act is the Little Placer claim.

The Court: Leave that out for the moment. What overt act of the defendants in connection with the matters that are alleged, before you come to the Little Placer claim, what act of the defendants occurred that resulted in damage occurring after 1929 aside from this Little Placer claim?

Mr. Carr: Nothing. We do not allege anything.

The Court: The Little Placer claim, as I understand—I just want to get it clear in my own mind—was an entirely different claim.

Mr. Carr: Oh, yes, a different claim.

The Court: It was not a claim they were availing themselves of as they were the other lease in order to carry on the business?

Mr. Carr: No, it was a claim we were endeavoring to secure, as I said, to enable us to carry on with our properties which we had then. While the exact date of the cancelation of this lease is not alleged in the complaint, it was in 1938. We filed our application on this Little Placer on June 1, 1928, so that was long before, ten years before we were shut down, and that was before we were run out of business, too. So we started to secure this Little Placer claim, or endeavored to secure it, and we were fought all along the line by the defendants. So we believe that that tied in with the general operation, with our general operations. Now, with the loss of this lease we cannot directly—I mean so far as I know the defendant did not go and cause the Government to cancel our lease, although there are many suspicious circumstances—in fact, the purchase by one of them of this particular property—but all of that time we were endeavoring to secure this Little Placer, which would have afforded us material on which to operate and carry on our business at the plant which we had already contracted.

Mr. Lasky: The Searles Lake plant was at Searles Lake. The Little Placer was several hundred miles away, and was a mine. Do you contend we were going to use the material from the mine in the Searles Lake plant?

Mr. Carr: Certainly. They carry many things—for example, aluminum and other ores—over two or three hundred miles. Take the iron ore up in the Michigan District. They bring it across the Great Lakes. Take Ford's factory there at Detroit, or near Detroit.

The Court: I do not think that is what counsel means. He is referring to the character——

Mr. Lasky: Yes, the Searles Lake process was one of evaporation from the lake.

Mr. Carr: We could have changed that. What is the difference? We had our buildings and our plant there. It is something which could have been changed, or if necessary we could have gone and built a plant, but we had our plant and we were perfectly willing to move it. There is nothing strange about that, bringing raw material to your plant, and there is nothing strange in changing the machinery in your plant to handle a different product. There is nothing strange in that, at all, except you might have stuck ice picks in our tires going down there while we were carry it in. But we contend, your Honor, that the Little Placer is tied in directly into *your* business. The overt act continued from 1929, from the day we filed our application we met opposition from these people, and naturally they were doing their best to secure these ten acres because if they did, they would have had every known supply in the world of this Kernite. They could have had no opposition or no competition, whatsoever, and it was necessary for them to do that, as they felt for their own protection to



secure this in order to accomplish the fruits of the conspiracy which had long before that been established and created. And so we say that our complaint, blushing say it in the face of all the charges made against the fruit of it, that we do allege the combination, the unlawful combination both under sections 1 and 2 of the Antitrust Act. The complaint goes on and shows the performance of these overt acts, a continual set of them from the time we got in the business, and particularly from 1929 right on, and the denial by Zabriskie of intention to injure, and the further fact that we had no knowledge of the formation of this conspiracy. We knew nothing about it. That, we contend, was the basis of it, and the concealment of those conspiracies. As your Honor said yesterday, they did not go out on the courthouse steps and talk blatantly about what they had done and were going to do to everybody. Of course not. They were concealed, and while we knew and felt the force of all these overt acts that were being placed against us during all this period of time, we had no knowledge of a conspiracy. We did not know that this contract of 1929 had been entered into prior, nor did we know of it subsequently. I think they call it the contract made after they came out here, shortly after their meetings in Germany and in England. They came out here and, as I said, scooped other victims into the thing and renewed their conspiracy with the Stauffer people, making them parties. They carried on a continuous conspiracy, and the only thorn in their side was Burnham. He was

down there struggling to get ahead with his comparatively small plant against this octopus which was pouring out its wrath and indignation that we should even have presumed to set out on a venture of this kind as against their wishes.

As I say, we have proved the conspiracy. We have alleged the conspiracy in our complaint. We have alleged the overt acts, and we have alleged the last of which was the Little Placer situation, which was continued until they confessed their wickedness in this court and contended that this court should make as a part of its judgment an order that they should abandon all applications, all attempts to secure that particular claim. And it continued up until past the filing of our particular suit. And let me say this, that this conspiracy, framed under the provisions of sections 1 and 2 of the Antitrust Act, was never known to us and was not disclosed, and we could not find out about it until after the Government, with all its might, had brought its suit here and had disclosed the formation of that 1929 agreement and the subsequent western agreement out here.

The Court: That conspiracy that you discovered on the filing of the Government's suit was an agreement that was entered into after your business was closed down?

Mr. Carr: Oh, no, your Honor.

The Court: You have alleged that in your complaint. You say there was another conspiracy——

Mr. Carr: No, but prior.

The Court: There was a prior conspiracy that resulted in the loss of your business, but the conspiracy that you discovered, as alleged in that complaint on the filing of the Government's suit was a conspiracy that is there described as having its inception in 1929. Am I not right about that?

Mr. Carr: No, the conspiracy in point of time you are, but the conspiracy which is the basis of our action is the original conspiracy, and that which antedated 1929.

The Court: I think you are right about that, but you have alleged a conspiracy prior to that time.

Mr. Carr: Yes.

The Court: But I do not recall any reference having been made to any allegation in the complaint that that conspiracy you discovered at the time of the filing of the Government's suit.

Mr. Carr: We do say that all the stipulations and acts of the defendants were not known until the commencement of this action. Let me see if I can find that. In our amendments we cover that:

“That plaintiff had no knowledge of said conspiracies and combinations herein set forth, or the intent or purposes of said defendants in the performance of the acts herein in this complaint set forth until on or about the commencement of an action by the United States versus certain defendants herein and filed in the United States District Court for the Northern District of California, Southern Division,



on September 14, 1944, and numbered therein 23690-G; that likewise plaintiff had no knowledge of said 1929 agreement referred to hereinabove and described in paragraphs 62 to 68, inclusive, or of the said prior or said subsequent agreements made pursuant to said 1929 agreement, until the said time of the filing of said action by said United States against said defendants herein on or about September 14, 1944, that while plaintiff did have knowledge of certain acts, things, and proceedings taken, had and engaged in by said defendants, or some of them, and as herein set forth, it had no knowledge, information or belief, or any opportunity to secure such knowledge or information, of the fact of the fraudulent and illegal formation of said 1929 conspiracy, or the said prior agreements which led thereto, or of said subsequent agreements, and was without knowledge or means of knowledge that all of said things, acts and proceedings of defendants, or some of them, as herein in this complaint set forth were so performed and carried out in fraud of plaintiff and pursuant to said 1929 agreement, or said prior or said subsequent agreements, until subsequent to the filing by said United States of said action against said defendants, or some of them, on September 14, 1944."

We believe that that covers the situation exactly, and in the face of their admissions on this motion, the complaint must stand as it is, and shows the basis of the action.

Again allow me to refer to the fact that the action is based on the conspiracies. It is the conspiracies and combinations which give us our rights, not the performance of the overt acts. They are incidental and follow the conspiracies. It is the conspiracies and combinations unlawfully entered into that are the bases of our proceedings here. Of course, we discovered these overt acts as they were done to us. You cannot have a hatpin stuck in your hair and not know you are in trouble somewhere, but where that might come from no one knows. We knew it was coming and it was happening to us, but we knew nothing about the fact that they were all happening to us as the result of these unlawful conspiracies and combinations which were entered into, and it is the discovery or the concealment, rather, of those conspiracies and combinations which are made illegal by the act, itself, and upon which our rights are based. In other words, if there had been no conspiracy, no combination, we could not be here in this court today.

The Court: What do you think about the contention that the defendants have made, that there was some duty to investigate further on the part of your client because the gravamen that constitutes the right to bring an action beyond the statute of limitations must follow from concealment.

Mr. Carr: Personally I do not think much of it, because the Little Placer was an overt act, and if the law of the Kentucky Telephone Company case is to stand, and which we believe is a proper ruling, why, the statute never began to run until the finish of the overt act involved in the Little Placer claim. It never did. It never began to run

The Court You make the point that the period of limitation fixed by the statute has never run because of the fact that there were overt acts being committed continuously?

Mr. Carr: Yes.

The Court: Assuming that is not so, that you are relying on the other——

Mr. Carr: On the conspiracy.

The Court: Yes.

Mr. Carr: I do not think that can be reached here, because we allege in this complaint we had no means of discovering it. Your Honor will recall that even in a common law conspiracy action the courts of this State have said many times a plaintiff is not to be charged with neglect for failing to discover something which is carried on in the secret confines of the defendants, themselves, that no charge of neglect can be made against them. Using the same illustration your Honor made yesterday of the courthouse steps, while a man must be diligent in his activities, what could we possibly have done, may it please your Honor, when these price cuts were coming on us and things of that kind, how would that indicate to us or how would we know or what means would we ever have of discovering the fact that this conspiracy had been formed and was entered into in writing either in England or in Germany, and also out here at the Fairmont Hotel when they did come out here subsequent thereto and made additional conspiracies with these Stauffer people and these Western people?



The Court: That raises very squarely, after all the discussion, a very simple question, doesn't it, that if a man is engaged in business and by the acts of one or more of his competitors he is forced out of business, the years go by, and the Government investigates and brings action many, many years after the occurrence of these events on the ground that these competitors have engaged in an unlawful conspiracy going back over a long period of time, that would mean, would it not, there would be no limit to the time when the party aggrieved could bring an action, until such time as when someone with great resources was able to discover that what happened was the result of a conspiracy?

Mr. Carr: What is wrong about that? Let us have that admitted for the face of the record. Let us admit it. What is wrong about that? Why shouldn't a person be punished for his wrongdoing when he is discovered, when the very gist of the thing is proof of the combination, which was illegal at all times? That is the purpose of subdivision 4, not to allow fraud and concealment to go uncharged or unchallenged.

The Court: Aren't there some other considerations, though, the difference between private rights and the public interest? A private right might lapse even though it arose out of a fraudulent transaction because of other considerations, due to the passage of time, no matter how fraudulent the scheme might be as to private rights. When you get into the field of public interest you have a different consideration. Do you think that makes any difference?

Mr. Carr: No, I do not think so, your Honor. I think that fraud in the violation of a statute, which is a fraud on the people, should never go unchallenged, especially when it is concealed. We allege it was concealed. In the next paragraph we go on to say they doctored their books and covered up in their books. Of course, there can be no question on that—I do not know to what extent—but the Kirstley letter, alone, which came before your Honor on our motion to impound, shows that their books were figuratively fixed. We had no access to their books. The Court will take knowledge of those facts. I think the decisions in those cases go to that extent, that a plaintiff will not be charged with neglect for that which he could not do. What right would we have to go to them and say, “Here, we want to look at your books. We think you are a lot of crooks.” What would have happened? We would have been put down the front stairs so fast we couldn’t have gotten in again. We had no right to see their books and records, and all this conspiracy rested in their own bosom and among themselves. As your Honor said, they do not shout this from the housetop at all. A conspiracy of this kind is always hidden in the dark, and there is no opportunity for anyone except themselves, and many of their own crowd no doubt did not know about the wickedness in which they were engaged, and the extent and purposes of it. So we say in the face of the motion today, in face of the statements in the motion that the complaint states these facts, and that those facts alleged are true in the com-

plaint, it is a concealment. Allow me to say to your Honor again it is our contention that it was the concealment of the conspiracy that was formed, two conspiracies—let me put it in the plural—that is the crux of the action. It is not the overt acts at all. It is the concealment of the conspiracy, because when you read this section 15 again, “Any person who shall *be in* his business or property *by* reason of anything forbidden in the Antitrust Laws may sue therefor,” and so forth, the violation of the Antitrust Law is a conspiracy. They have to enter into a conspiracy, and if the injury results to the plaintiff as the result of such conspiracy, that is a continuing conspiracy. I think if your Honor will be good enough to read that Kissel case and the Telephone case and the others cited there you will see that point, and I do not think there is anything in the Foster & Kleiser case which militates against this as all. They do go on to say in there—and I make no criticism of Judge Lord, for whom I have the greatest regard and respect, but in writing the opinion and reading it you will see that all reference to the Kissel case and all reference to the contentions of plaintiff in that particular case as coming within this subdivision (4), in which we claim to come also, is dicta. It is dicta in the light of the admission by the defendants of their intention to put the Special Sign Company out of business. It is for that reason that counsel have been so active and so anxious to get before your Honor on this motion the Reno proceedings, and some allegations that went into the complaint



up there are in Burnham's affidavit. Now, we will be glad to meet that factual situation and explain the whole situation when the proper time comes; if your Honor will set it down for a hearing on that particular question of the statutes we can meet it. It is a factual situation that has no place in this particular argument.

The Court: Of course, if the facts were established that you knew there was a conspiracy to violate the antitrust laws at that time, you would be barred.

Mr. Carr: Yes, but they could not raise it on this motion, your Honor, in the way in which it is presented by ex parte affidavit. You can't try this case by affidavit.

The Court: Of course, that is a pretty important question.

Mr. Carr: Very important. They could not try it, because we have no opportunity to gainsay it. One would say one thing and we would come in with a counter affidavit, and where would your Honor be? There is no right of examination or cross-examination.

The Court: What authorities did you refer to earlier—I think it was this morning, when you said something about a separate trial on the issue of the statute of limitations.

Mr. Carr: Oh, yes, that is done, and we cite the authorities and the rules that apply to that. I will give it to your Honor now, if you would like to see that.

The Court: I did not know that there was any special rule on the statute of limitations.

Mr. Aitken: It does not refer to the statute of limitations alone.

Mr. Carr: It is done all the time, your Honor. I refer to Rule 42(b), headed, "Consolidation; Separate Trials."

"The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third party claims, or issues."

I refer to 36 Fed. Supp., 568, at page 571, where that was done.

That was the case of *Momand vs. Paramount Pictures Distributing Company*:

"During the past ten years, a number of suits have been begun, either civil or criminal, by the United States Government against the motion picture industry. The plaintiff asserts that these have the effect of tolling the statute of limitations under the provisions of Title 15, Section 16, U.S.C.A., set forth above. Whether or not they have such effect depends on whether or not the present suit involves any 'private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding.' No attempt can here be made to express any view

as to whether some or all the items of damages alleged are barred, because the determination of these questions depends in part upon matters of evidence.

“Enough has been said to indicate that at some time the issues raised by the pleas of the statute of limitations must be considered, and that they can be determined upon much less evidence than would be involved in a trial of the whole case.

“Rule 42(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723(c), authorizing the court, in furtherance of convenience, to order a separate trial of any separate issue was applied in *Seaboard Terminals Corporation vs. Standard Oil Company of New Jersey*, 30 Fed. Supp., 671, 672, in the District Court for the Southern District of New York, where the court said:

“‘An antitrust suit, such as the one at bar, is usually complicated and protracted. So, considering the time and expense that may be consumed at an actual trial, and since a determination of this one issue may end the entire litigation, the court is inclined to exercise its discretion in favor of a separate trial of the issues of statute of limitations.’

“The same considerations apply to this suit. Accordingly, it is ordered that the case be tried separately upon the issue of the statute of limitations, and the filing of objections to and the answering of the interrogatories pro-



pounded by the plaintiff to the defendants is to await the trial of this issue.”

That was done by our circuit court, here.

Not long ago, in the case of *Hart vs. Mount Gaines Mining Company*, which went up from Nevada, and in which there were no findings of fact, we, representing the defendant, made a motion that the court hear on the appeal first the question of the failure to make findings, and send the case back, or send an instruction to the lower court to make its findings of fact and send it up without hearing the whole particular at the particular time. So the motion was made and it was granted by the court and the matter sent back to the district court to make his findings of fact and conclusions of law, send them up, and they would then be a part of the record. So it is not an uncommon practice—and I did not cite more than this one case because it was so applicable on the thing and the rule we believe giving them to right to trial is so clear—

The Court: That is cited in your memorandum?

Mr. Carr: Yes, your Honor, on pages 3 and 4. We cite the different sections of the rule and we also cite that Rule 7(c) providing:

“Demurrers, Pleas, etcetera, Abolished.

“Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.”

Then it goes on to say in another rule, Rule 8, subdivision (c):

“In pleading to a preceding pleading, a party shall set forth affirmatively accord and

satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.”

We believe, as I said this morning, this plea of the statute has no application on this motion. If the complaint of course, does not state a cause of action by reason of the statute and it is apparent on the face of the complaint, itself, that, then, would be reachable by a motion based on the statute. There is no question as to that. But I think that aside from that, that that is the only way under the rules here that the factual question of the statute of limitations can be raised, and I think that when your Honor has had an opportunity to examine that, you will be persuaded that way. I do not want to impose too much on your Honor’s kindness and consideration on this question of conspiracy and the statute of limitations on the face of the complaint. I think I have said about all I could as to that. There is no need of repeating. Your Honor is fully advised of our position, and I would like to leave with your Honor these authorities.

The other questions that have been raised concern the motion to strike. I might say the greater part of our complaint is a copy of the Government’s action in the civil cause before your Honor, and that was done for two purposes: First, because it

was a very accurate and very comprehensive statement of the historical development not only of the conspiracy, but of borax, itself, a description of it, and of the industry, and also of all the facts leading up to the formation of the conspiracy, because our conspiracy on which we rest here is the same conspiracy that came before your Honor in the civil action by the Government; secondly, because we believe the Government's complaint is so splendidly drawn and clearly sets forth the whole history of the matter.

There is no question as to the historical facts being proper in a matter of this kind. In fact, we have cited some cases where part of the overt acts or part of the conspiracy consisted of acts prior, even, to the passage of the Anti-trust Act, and they were held to be proper. They developed the conspiracy from the beginning. If we had just come in here and stated that a conspiracy was formed, that borax was an article of commercial use, that a conspiracy to gain all of that in violation of the Anti-trust Laws was entered into in such and such a year and this and that, we would have been met with countless motions such as we were this morning, that it did not state a cause of action, that we did not describe how they did it, and why we did not peek through a keyhole and see what they were doing in their offices, and matters of that kind, and the courts have all held, and I think we have cited in our memorandum authorities to that effect, that it is proper to set that forth. I refer to *People's Tobacco Company vs. American Tobacco Company*,



and also Judge Caffrey's opinion in one of those Aluminum Company cases, 44 Fed. Supp. That was a case which took two years to try. That is a very interesting opinion, historically as well as from the law which he sets forth. I do not know what happened to that case. I think it is on the way to the circuit court now. The opinion at least is very good. And then there are all of those tobacco cases which are referred to, many of them, in those authorities. So we say certainly no harm is done by setting forth specifically each and every step that we contend was done in the performance, in the making of these conspiracies, or the facts of the historical development of borax and its general application in the field of industry.

I think when your Honor sees the motion to strike the paragraphs with reference to the Little Placer claim, you will see that that is understandable. If they got that out of the way they could rest content on their statute of limitations plea, but we submit that they cannot. When your Honor reads that you will see it is the whole story. Our complaint is individual to the extent that it applies to the plaintiff. It sets forth the effects of the conspiracy and of the acts charged, the offenses performed under the conspiracy, what they did, how they offended against the laws, and the effect of the conspiracy. That is paragraph 71, page 29, the Little Placer, the offenses charged; and paragraph 58 states the specific actions which they did pursuant to the conspiracies, and 67 is an allegation that they were all continuing conspiracies. The plaintiff's situation

begins with paragraph 72 on page 30. From there on it gives the history of the plaintiff, what happened to it from the beginning of the lease that Mr. Burnham had and turned it over to the company, and they move to strike out that portion of the paragraph 73 referring to the fraud order:

“That said fraud order was based solely upon the ground that the patented solar processes transferred by said Burnham to said company were not feasible and would not operate successfully; that said fraud order was brought about largely through protest and demand of a highly placed Federal Government representative who formerly had been, prior to his appointment to said position, the Chicago manager and representative of defendant Pacific Coast Borax Company; that at the time of making said protest said official was the president of defendant Sterling Borax Company.”

For your Honor's information, we might state we have a letter from this man admitting his activities in this particular field.

We think our general allegations which I have read to your Honor already on pages 40 and 41, and then we come in with our amendments and charge directly our lack of knowledge, and supply that which the defendants claim was deficient in the complaint. And so, your Honor, we thank you for this opportunity. We feel that our complaint states a cause of action on its face, and therefore the statute is not available, the statute of limitations, and the matter of these motions should be denied

and the answers should be ordered filed, whereupon if the defendants are insistent and ask, we ask to join with them in an application and have the matter set down for trial on the special issue of the statute of limitations.

Thank you, your Honor.

### Certificate of Reporter

I, J. J. Sweeney, Official Reporter, certify that the foregoing 42 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ J. J. SWEENEY.

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[Title of District Court and Cause.]

### REPORTER'S TRANSCRIPT

Monday, January 16, 1946

#### Counsel Appearing:

For Plaintiff: Sterling Carr, Esq.

For Defendants: Moses Lasky, Esq., Charles L. Beardsley, Esq.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Lasky: Your Honor, I believe the first thing that ought to be done is to fix the question or questions which are to be given to the jury so we might know how long the case is likely to take.

Mr. Carr: I think we ought to have the case set.



The Court: When is the case set?

Mr. Carr: The 4th of February.

Mr. Lasky: Your Honor took it off calendar. It is on this morning for re-setting. I understood we were here today to complete the pre-trial conference. At the last hearing on December 2nd we had quite a discussion, and I understood that some specific question or questions of fact were to be presented to the jury, and that both sides were to present to your Honor suggestions to that effect.

The Court: I received communications from both sides in the matter. I received suggested instructions and a memorandum from Mr. Carr, and likewise two letters from Mr. Lasky on the subject.

Mr. Carr: Yes, your Honor.

The Court: I have read them all, and I think we might as well see if we can agree on the issues to be submitted to the jury and then set the case at sometime that would be mutually acceptable.

Mr. Carr: As I understood, at the last hearing on December 2nd your Honor finally requested that each of us submit to your Honor suggestions of what we thought should go to the jury, stating that they might be of some assistance to you, and your Honor would then decide what you would do with the case.

The Court: If it would be agreeable to you I might state to you what my idea is, or you could present anything additional.

Mr. Lasky: We have presented our views. I think it is now up to your Honor.

The Court: I, of course, had considerable to do with this case on the motion for summary judg-

ment. I denied the motion for summary judgment because it seemed as if there might be lurking in the case some matter of weight of evidence, and in view of some of the decisions of our circuit court I felt it would be better to deny the motion and to have those matters determined preliminarily, that is, the matters that have to do with the statute of limitations.

Mr. Carr has submitted a memorandum in which he suggests the instructions to be given to the jury. I am not wholly in accord with that idea. I feel that this case, in so far as what is to be submitted to the jury is concerned, presents a very narrow issue, and that is the issue of the statute of limitations, the factual basis for determining the question of the statute of limitations. The court will, of course, have to determine whether or not this action is barred by the statute of limitations, but it will be guided in making that decision as to the question of fact by the decision of the jury on the question of fact. In my opinion it would be error to permit anything to go to the jury except a very narrow question. The jury should not be concerned in this case with whether the defendants violated the Antitrust Law, whether they are good people or bad people, nor should the jury be concerned with who the plaintiff is, whether he is a good man or a bad man, whether he conducted himself properly or whether he had bouts with the law, or not.

You may think it is strange that I mentioned that, but to permit any extraneous matters to go to the jury would only result in the jury attempting

to bring to their aid matters that have nothing to do with the bare question of the statute of limitations. That is why I think the case should not be submitted to the jury on the theory suggested by Mr. Carr. I believe we have to treat this in the nature of a demurrer and the allegations of the complaint must be deemed to be true.

It would seem to me—and I am just stating this informally because this is a pre-trial conference—it would seem to me the court ought to say to the jury, “An action has been commenced in this court to recover damages for alleged breach of a statutory obligation, namely, the Sherman Antitrust Law, that the law gives a right to maintain such an action to any person who is aggrieved by violation of the Antitrust Statute, but the jury in this case is not concerned with whether or not there is or was such a violation of the statute. It is not concerned with the merits of the case at all; that the court has heretofore had presented to it the preliminary question as to whether or not this action is timely brought, and in connection with that an issue of fact has arisen and it has been decided to submit to the jury just the simple question of whether or not there is factually a timely action here, and that the jury will only be concerned with that issue, and the evidence will be limited strictly to that issue.”

I know that I can say this in the pre-trial conference. There isn't any jury present. Both of you are experienced lawyers. Perhaps it might be an advantage to Mr. Carr's side of the case for him to be able to talk about a violation of the Antitrust Law, and that might create in the minds of the



jury the idea that plaintiff should be permitted to proceed with his case and be heard. However, the statute of limitations is not a technical defense. There is a policy of the law behind it, and I believe the jury should be very strictly limited as to what it should consider in this case. I think—and this is just very informal and preliminary—that it would be sufficient if the jury, after being told generally the nature of this proceeding and why they are sitting in the box, and the reason for this special hearing, so that they may have their minds directed toward the essential issue to be presented, would be to tell them that their only function is to determine whether or not prior to the time within which the action could be brought the plaintiff knew or had reason to believe that it had a cause of action for violation of the Sherman Antitrust Law against the defendants in this case. That, it seems to me, if perhaps not precisely in that language, at least in language that would convey that idea to the jury, would be sufficient for the jury to go on, and then each side to limit itself.

It is a little difficult because there is a long history to this litigation and to these matters, but it seems to me if both sides cooperate, the issue can be intelligently and adequately presented to the jury, even though it is to be limited.

There is another question also that I think would have to be decided, and that is, who would go forward to present the evidence first on this issue?

Mr. Lasky: I think that since there is actually a claim of fraudulent concealment to evade the statute, the burden is on the plaintiff.

The Court: What do you think, Mr. Carr?

Mr. Carr: Any way your Honor wants.

The Court: Well——

Mr. Carr: We will take the burden. We will assume the burden.

The Court: It amounts to this: There must be a preponderance of evidence, according to all rules, to be borne by him who has the burden of proof. I will be glad to decide that unless you gentlemen can agree between yourselves as to that.

Mr. Carr: I think we should, because we are advancing facts which we claim tolled the statute of limitations, and I think that burden does rest with us.

The Court: As I see it, the evidence that you would present would be something of the same evidence that has been presented in support of the motion for summary judgment, wouldn't it?

Mr. Carr: I think so. Without any definite thought as to that question, it seems to me on the spur of the moment, and reserving the right to make different or amendatory statements, I think it is up to us to prove why we did not know of these violations, why we did not bring our suit before we brought our suit.

The Court: That is right.

Mr. Carr: We claim that the statute was tolled. Therefore, we should prove that within the purview of the decisions.

Mr. Lasky: I think that is correct.

Mr. Carr: That would give us the opening and also the closing. Frankly, that is what I want.

Mr. Beardsley: May I make a suggestion, if your Honor please? It occurs to me, your Honor, in view of the statement of the issue as stated by your Honor, and Mr. Carr's statement just now, that that still brings up the question of whether there was a violation. In other words, he wants to prove why he did not know of these violations, and as I took your Honor's statement of the question, all that might be presented is as to whether or not the plaintiff knew or had reason to believe that it had a cause of action. Now, that necessarily—and I think I am practically repeating your Honor's words—that necessarily involves the question as to whether there was a cause of action, and, after all, we cannot try the question of knowledge of there being a cause of action without trying the question whether there was a cause of action. Mr. Lasky presented a letter to your Honor. You have had nothing definite from myself or from my associates, but we are in complete accord with his statement. In that letter he stated that the issue to be tried is not whether they had a cause of action, but whether the plaintiff believed that he was damaged by the action of the defendant. The question of the plaintiff's belief—after all, that is the only question we can try without going into the merits, and if the plaintiff had the belief, then your Honor could decide, if the jury finds for the plaintiff—

The Court: If I may interrupt you there, I am assuming when I say a cause of action; of course, there would not be any cause of action unless there was damage. The statute does not give a private



individual the right to bring an action because somebody has violated the statute. I am a fellow who has a restaurant on Market Street. I cannot sue the borax company in a civil action for a breach of the Antitrust Law unless I have suffered as a result of it. So when I say, "had reason to believe he had a cause of action," inherent in that there is a cause of action that presented some reason for the plaintiff to bring the action.

Mr. Beardsley: How are we going to try in this proceeding the question as to whether they had a cause of action? I mean, how are we going to try the question of believing they had a cause of action without bringing in the question that there was a cause of action? As I understand Mr. Lasky's suggestion, in which we concur, it is that after all the statute is tolled if within the time the plaintiff believes it has been damaged by actions of the defendant. The question whether those actions were rightful or wrongful is not to be tried at this time. But if the plaintiff had that belief, it was his duty to proceed, and the statute was not tolled over the period he had that belief. We can try that issue without trying the question as to whether there was any justifiable foundation for the belief. But we cannot try the issue as to whether he believed he had a cause of action without trying the issue as to whether there was a cause of action. I am trying to express the view that I thought Mr. Lasky had expressed in his letter.

Mr. Carr: I would like to say this: If Mr. Beardsley will read the Pashley case, he will see

that that very question is discussed. The plaintiff knows that all these damages are happening to him, but he does not know he has a cause of action. He does not know he has a cause of action until he knows or finds out that the defendant has violated the law in some respect. The Pashley case is absolute on that, and also, not so strongly, but to the same point, this last Supreme Court case that we cited to your Honor.

Mr. Lasky: If your Honor please, as I understood you were only indicating roughly what the question would be, not being precise. Your Honor's question was whether prior to the time the plaintiff should have sued—and, of course, he can always select the date on that; I think October 10, 1939—the plaintiff knew or had reason to believe that he had a cause of action. Of course, the cause of action, as your Honor has just indicated, is composed of two elements: the violation of the Sherman Act and damage flowing from it. The plaintiff asserts he knew he was damaged by these price cuts and the so-called fraud order. He claims he did not know it was the result of a conspiracy, which would be the violation of the law. Your Honor has in the question, Did he have reason to believe? Suppose, as we contend the evidence will show, he did believe and was convinced—convinced in his own mind, I think is the way your Honor expressed it in a tentative way at the last hearing on December 2nd—and yet suppose the jury found he was convinced in his own mind that there was no good reason why he should be convinced in his own

mind? He believed, but there was no reason why he should have believed. Then where do we stand? It seems to me the question is, Did the plaintiff believe, or could he have believed——

Mr. Carr: When an injury comes to a man he can believe it is the result of the act of his adversary, but he may not know it. It is the knowledge and not the belief, and that is actually what the Pashley case and the case cited therein hold. If your Honor will read it you will see. It is a question of knowledge and not of belief. You believe the fellow damaged you or injured you, but you do not know that he did. You do not know that he did. You believe as the result of his action but you do not know it absolutely. The Pashley case and the case cited therein exactly cover that point.

Mr. Lasky: No.

Mr. Carr: Mr. Lasky, you read that other case that is cited and quoted at some length in the Pashley case.

Mr. Lasky: He cannot have knowledge of whether there was a violation. You can't ask the jury, Did this man have knowledge?

Mr. Carr: That is the only point.

Mr. Lasky: Mr. Carr, I would like to be heard.

Mr. Carr: Go on.

Mr. Lasky: The jury cannot say whether this man had knowledge of whether there was a violation or conspiracy under the Sherman Act until it is established that there was a violation. You cannot have knowledge of something that does not exist, and, of course, we contend it did not exist.



And yet that issue nobody wants to try at this time. That is the whole purpose of having a special trial. If you put it in terms of knowledge, you presuppose the existence. You can't put it in the form of "should he have had knowledge," because the only way you can prove that, or go into it, or ascertain it is to ascertain all the surrounding circumstances of what we did, which question would lead into a trial of the main case. We contended on our motion for summary judgment that the plaintiff actually believed he had been wronged. We went further. We said he was convinced in his own mind and still he did not sue. That is a simple question that the jury could answer "Yes" or "No," and your Honor would then be in a position to determine whether, as a matter of law, the case was or was not barred by the statute of limitations as a consequence of the jury's answer, whatever it may be. But it seems to me phrasing it in any other way leads directly into the main trial. I would not have any objection, and I do not think my associate would, to a question which would read, "Prior to October 10th, or whenever it was, did the plaintiff know, have reason to believe, or did believe that it had a cause of action?"

Mr. Carr: Not belief. You can always believe that your adversary acted, but until you know you have no cause of action.

The Court: What is the distinction between the use of the term "know" and "believe"?

Mr. Carr: If I may answer the question, if you believe, you may be convinced in your own mind

absolutely, but you have not the definite knowledge that the defendant did it. You may believe. You may be injured and you may believe that it was the result of the other automobile's negligence. But until you know whether he was over on the other side, on the wrong side of the road, you cannot——

The Court: It is still not clear to me what is the difference between the use of the term "believe" and "know."

Mr. Carr: I think there is a big difference.

Mr. Lasky: There is one difference. You can believe something that does not exist, but you cannot possibly know about it. In other words, you can believe that the defendants here conspired together, but if in fact they did not conspire together, which is our defense on the merits, you cannot know it, because you cannot know something that is not so. That is what concerns us so much about casting the question in the form of knowledge, because it presupposes existence.

The Court: I think what we really mean here is not the difference between belief and knowledge, at all. It is the question of something having been brought home. It is more in the nature of notice than knowledge, isn't it?

Mr. Carr: That is true, too.

The Court: All questions that involve the condition precedent of timely procedure have more to do with notice than anything else, isn't that true? If some fact is called to a person's attention but he takes no action with respect to the matter, he may lose his rights. What has been bothering me

a little bit about the matter—and that is why I have been informal in discussing it—is the question whether it is not so much a matter of belief or knowledge but more a question of facts being brought to the attention of a person which he either paid attention to or disregarded. Isn't that the nub of it?

Mr. Beardsley: In phrasing the question as your Honor did, it still comes down to the question of whether there was a wrong. You said, "Did he have notice of it?" That has the same element of determining whether there was something that entitled him to recover. It occurs to me that the surest way of trying the issue of the statute of limitations without involving the question of whether there was a violation of the act is on the question of belief, because if I believe I have a cause of action, yes, I must have the evidence. I may have to do a lot of digging around to get the evidence. I may have to take depositions. But that puts me on notice, and I can't sit by and let the statute run.

My belief is sufficient to toll the statute.

The Court: I agree with your analysis of it, but I do not think it is a question of belief. I think it is a question of merely a factual matter being brought to the attention of a person. There does not have to be any belief about it, at all. In other words, if someone told Mr. Burnham, and he had notice thereby, that there was a combination in restraint of trade in violation of the Antitrust Law between these defendants, and as a result of that his business was affected, that is sufficient to put him upon



the duty within a timely period of bringing his action. Isn't that correct?

Mr. Lasky: Your Honor has put a case where someone has told him of certain facts, and even though he does not believe he has a cause of action, he ought to do something about it. Suppose we have the reverse, where nobody has told him anything but he believes he has a cause of action. He believes it from circumstances, namely, that both companies cut their prices about the same time. Because of that he believes he has a cause of action, even though nobody told him anything; why isn't he still barred?

The Court: I was not intending to limit it to what anyone told him. I meant by any circumstance he was given notice, of course.

Mr. Lasky: My point, to carry it further, is if it is cast in that form of circumstance giving notice, the tables would be turned and the defendants would have to come into court and produce evidence of circumstances from which a jury on the main trial could conclude by circumstantial evidence that there had been in fact a conspiracy, because that is the only kind of notice he could have had from the circumstances, and certainly we should not be put in the position of having to prove by circumstantial evidence that there was a conspiracy or something from which you can deduce the existence of a conspiracy.

The Court: I believe on the motion for summary judgment the records in the Nevada Court were produced.

Mr. Carr: Yes.

The Court: Aren't there writings that would be more or less determinative of the matter, depending on how much weight——

Mr. Lasky: Yes, I think so, but there is this character of writing: Writings by Burnham to this person or that person, verified complaints, saying in firm language the defendants have violated the Antitrust Law to his damage, that he has consulted counsel, and counsel believe he has a cause of action, but he has not sued because he hasn't got the funds to carry it out.

Mr. Carr: That is not fair.

Mr. Lasky: I am not binding the court by what I say.

Mr. Carr: Don't say it unless you know it.

Mr. Lasky: I do know it, and it is absolutely true.

Mr. Carr: You haven't any such records. You have one letter.

The Court: It is assumed there may be something of that nature.

Mr. Lasky: That may be of that character, yes, which would establish, we think, his firm belief that he had a cause of action. And yet, suppose no evidence were produced that there was anything that put him on notice? I do not know what kind of evidence could be produced that would show he was put on notice.

The Court: According to what Mr. Carr said a moment ago, something along that line but leaving out part of it, I take it that there can't be any doubt that that being the document that was signed

by the man, I think from what Mr. Carr said the reason why he feels he has the burden in the case is that, having known about it, he contends that thereafter there was some kind of concealment of that matter which led him to believe that the so-called alleged unlawful acts had ceased, and he believes it is his burden to establish that concealment.

Mr. Carr: That the statute was tolled by the concealments.

Mr. Lasky: The only concealment that counsel has pleaded in his complaint was an alleged statement by Mr. Zebriskie which occurred prior to the dates of these documents we have referred to.

Mr. Carr: That is wrong. Paragraphs 75, 81(a) or 81(b) set forth that they concealed, that they hid the whole thing in their books and records.

Mr. Lasky: Now we come back to another question.

The Court: Yes. I would not submit that to the jury. I have read that all over. If there is any concealment it involves wholly, in my opinion, from what I have read of the briefs here alleged statements of Mr. Zebriskie. There is nothing else alleged except, as you have said, the matter of the books. I do not know how anyone can conceal anything by his own books.

Mr. Lasky: The documents we offered on the motion for summary judgment were certain documents dated before the alleged Zebriskie conversation and documents subsequent thereto, which, in our opinion, reaffirm the statements expressly made and those prior thereto.



Mr. Carr: Yes, but a lot of them were left out. In view of the affidavit that he had seen Zebriskie, we withdrew all of those allegations in the complaint.

Mr. Lasky: That is a fair issue to go to the jury: Whether after Zebriskie's conversation he had the same state of mind as he had before, and as expressed in the previous documents. That would be a fair question. But it still comes down, I submit, to his state of mind.

Mr. Carr: It is not a state of mind. The Pashley case so holds.

The Court: If it was not a state of mind what else could it be?

Mr. Carr: I would ask when did he actually discover the conspiracy? That is the point we suggest in our suggested instructions. To our mind that encompasses the whole matter.

The Court: What do you mean when you say he actually discovered it?

Mr. Carr: When he found out that they had conspired.

The Court: What do you mean when you say he found out that they had conspired?

Mr. Carr: He discovered the conspiracy, and that is when the Government filed these suits here in 1944.

The Court: By the mere filing of the Government's suit he did not discover anything more than he had known, did he?

Mr. Carr: Yes, he did, your Honor. The fact of these meetings and these conspiracies were shown

by the allegations in the Government's complaint.

The Court: The allegations of the Government's complaint may have been untrue.

Mr. Carr: They pleaded to them.

The Court: That is a different question.

Mr. Carr: We will prove that they were true by their own writings.

The Court: Your contention really comes down to this: He did not discover the conspiracy until there was a plea——

Mr. Carr: No, until the Government charged it and certain letters were found here and certain documents, letters of these defendants that proved the conspiracy, and certain facts——

The Court: What you are saying there is he did not discover the proof of the conspiracy.

Mr. Carr: No, he did not discover the conspiracy, your Honor. He knew nothing of the conspiracy. He might have thought these people were hurting him individually and yet had no proof of a violation. The violation of sections 1 and 2 rests in the conspiracy.

Mr. Lasky: You say now he might have believed they were acting individually. That we think is a fair question that should go to the jury: whether he believed that he had been damaged, not by their act individually, but by their acts violating the Sherman Antitrust Act.

I would like to make two statements: First, the Government's suit makes allegations about meetings which had occurred long after the plaintiff was out of business, and there is nothing in that com-

plaint in language or in the criminal indictment referring to any events prior to the fall of 1939. But more important than that, it seems to me, Mr. Carr's presentation is vitiated by an essential fault. This is not a case where the statute of limitations would not begin to run by discovery, using that term in the general sense. This is a case where it begins to run automatically when the wrong was committed, but it may be tolled by fraudulent concealment. In other words, it is not a suit to determine when the statute began to run; it is a suit in which he invokes the fraudulent concealment to stop the running. That means there is no tolling of the statute unless he has been led by the fraudulent concealment to desist from doing something. That means he must rely on some things Zebriskie told him. If he in fact did not believe what Zebriskie told him, or if he believed Zebriske for a while and then he came back to his former belief that there was a wrong, a violation of the Sherman Act to his damage, then he has not been led by a fraudulent concealment to desist from doing anything, and we are back to where we were in the beginning, namely, the statute of limitations has run.

So it is not a question of discovery, at all. He still may know nothing. But as long as he does not believe Zebriskie, there is no fraudulent concealment. If Zebriskie said, "We did not violate the law," and Burnham said, "I do not believe a word you told me," the contention that the Zebriskie conversation was a fraudulent concealment would pass out of the case and it would be wholly important



whether any fact was ever called to his attention which would put a reasonable man on notice. I submit that would be a sound analysis, and if that be true, it comes back again entirely to Burnham's state of mind. In our proposed question we used the word "believe." It may be any other word. Your Honor tentatively used the phrase "convinced in his own mind" in our December 2nd conversation. Any other form of expression which would bring out the same thought of state of mind would serve our purpose, I believe.

Mr. Carr: Very nicely, but that is not the law. We are perfectly willing that your Honor form any expression you desire after reading the Pashley case and the cases cited therein, the Kimball case, the Pashley case, the other California cases, and also the last case in the Supreme Court, the one which we cited to you. We are perfectly willing that your Honor make whatever instructions your Honor would think, subject to our objections and exceptions.

Mr. Lasky: On the basis of the briefs and these letters I have written, the defendants are willing that your Honor frame the question, reserving the right to object or except to any question we think is improper.

Mr. Carr: If we are getting into a metaphysical discussion before the jury as to belief and knowledge, it might be better to try the whole case.

Mr. Lasky: I trust it will not be necessary to get into such discussions before the jury.

Mr. Carr: That is what your question would present. If your Honor would read the Pashley case——

The Court: I am familiar with that. We have a different problem here. We have a problem of framing an issue before the jury. If the court were deciding the matter, it would make it much simpler, but you are entitled to a trial by jury on an issue of fact, and we are now confronted with the problem of limiting the issue so we won't have the jury deciding the case on some small basis or by the introduction of extraneous matters. It therefore becomes very much more difficult to frame an issue that will assist the jury to justly decide an issue upon only the facts that pertain to that issue, and if we do not frame it properly, all it means is, no matter which way it goes, it will be just expensive litigation for everyone concerned from then on, because if the jury decides against the plaintiff in the matter and we have not framed the issue properly, he is going to review the matter, and then eventually the case may have to come back to be retried on that issue again, and if, on the other hand, the jury decides in favor of the plaintiff and we go ahead and try the case, it may go back again because of the fact that on the issue of the statute of limitations, the issue was not properly framed to the jury; so it becomes very important, in the natural enthusiasm that each side has for its case, to get the query framed in the most favorable way to his side, there may be a disservice to the man who propounded that idea, because it would not be the end of the matter.

If there is a framing of the issue in a way that is favorable to one side or the other and a corresponding favorable result obtained from the jury, it will be knocked out later on the basis that it was not a correct and a just framing of the issue. So it becomes somewhat different along that line.

Mr. Carr: It does, and for that reason I am perfectly willing to leave to your Honor, reserving of course our right to an exception, the preparation of this question. You have had both of our views. That is what you asked for in the beginning. And then you stated possibly they would be of some help to you. All we ask is that your Honor read the Pashley and similar cases cited, and then make your ruling. The question is now down to the difference between the words "believe, knew and knowledge," and that is what your Honor is going to have to pass upon.

The Court: Perhaps I had better take a few days longer and frame something in writing on this matter, so you will know how to govern yourselves.

Mr. Lasky: When you have done so I might suggest it could well be put in a pre-trial order so that both sides know where they are headed for.

The Court: I think so. I think, I will make a pre-trial order saying, "The issue to be presented to the jury is such and such," and the court will fix the precise query to be presented to the jury, so each side can know the limits of the evidence that it will be called upon to present.

Mr. Carr: Will your Honor now set the case?



Mr. Lasky: On that may I be heard a moment? I submit it would be better to defer setting the case until your Honor has framed the issue, because depending on the scope of the issue we would know how much time we would need.

The Court: Suppose you tell me about when you would like to try the case?

Mr. Carr: We would like to try the case at the first earliest date after the 1st of March. It was originally set for February 4th. Mr. Lasky called me and said he had to go east and remain there for thirty days for various purposes. I told him it would be agreeable, provided it was not continued for longer than thirty days.

Mr. Lasky: What counsel says is quite correct. I go east on the 18th of January. I have a case before the United States Supreme Court on the 5th of February, and I will be back here about the 10th of February.

The Court: You had probably better count on a few days more.

Mr. Lasky: Since some time in November we have been trying to get Mr. Burnham's deposition.

Mr. Carr: You never spoke about that until our conference.

Mr. Lasky: I spoke to you on November 18th in this courtroom.

Mr. Carr: We have tried to suit your convenience in the matter, and I even wrote to him asking him to come back earlier, which he agreed to do until you thought you would not be here.

Mr. Lasky: He would not have been back, as I understand it, until the 20th of January, if the Court please, two days after I go to Washington. Mr. Aitken will come here for the deposition. After we take the deposition it may be necessary for us to take depositions back east. We do not know until we have his deposition.

Mr. Carr: We ask that your Honor set the case definitely. It has been dragging along here, and we think we are entitled to an early trial, as early as your Honor's convenience would permit.

The Court: How long do you think, if we properly limit the issues, it would take to try the case?

Mr. Lasky: If it is limited, as I think the case should be limited, I think the case could be tried before the jury—I am just guessing—in two days, at the most.

Mr. Carr: I think three. I think we could finish it in three.

The Court: You are both agreeable to setting it some time in March?

Mr. Lasky: Yes, I think so, and we would suggest on our part toward the latter part.

Mr. Carr: We would like to get as early a date as suits your Honor's convenience.

Mr. Lasky: Because we won't get Mr. Burnham's deposition until, roughly, the middle of February.

Mr. Carr: That is not his fault.

Mr. Lasky: It is partly his and partly ours.

Mr. Beardsley: I will take the fault. The fact is we haven't got it.

Mr. Lasky: Then after we have taken it we have to act accordingly.

Mr. Carr: We ask your Honor to set it as early in March as your Honor's convenience will permit.

The Court: I have had to re-set a number of admiralty cases, which are entitled to some precedence, because of the fact that I was engaged in this Alcatraz Penitentiary case, and about ten of those cases had to be re-set.

Mr. Carr: We know that.

The Court: It will have to be in the latter part of March.

Mr. Carr: Very well, your Honor. Whenever your Honor's convenience permits the setting of it is perfectly agreeable to us.

The Court: I will set it for the 25th of March. That is a Tuesday.

Mr. Carr: Thank you, your Honor.

The Court: And I will file a written memorandum in the next week, during the course of this week, perhaps.

#### Certificate of Reporter

I, J. J. Sweeney, Official Reporter, certify that the foregoing 27 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ J. J. SWEENEY.



[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Monday, December 2, 1946

2:00 o'Clock P.M.

The Clerk: Burnham vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready, your Honor.

The Court: Proceed.

Mr. Harrison: We ask your Honor for this conference not only for the purpose of pursuing the relief ordinarily obtainable on a pre-trial conference, but also because of certain special difficulties that seem to us to be involved on a separate trial of this issue. In the stipulation which was entered into by the parties when the question arose as to whether a motion to dismiss should be regarded as a motion for summary judgment, and where in it was agreed between the parties that the motion before the Court should be so treated with leave to the plaintiff to file additional affidavit, it was provided that in the event that both the motion to dismiss and the motion for summary judgment are denied this stipulation shall be without prejudice to plaintiff's right to apply for a separate trial of the issue of the statute of limitations or any other issue under Rule 42 of the Rules of Civil Procedure, and it shall be without prejudice of any right of any defendant to oppose any such trial, and we reserve the right to oppose any separate trial, because we concede there might be difficulties with regard to a separate trial.

Thereupon the motions to dismiss and the motions for summary judgment were argued at length before your Honor, and your Honor handed down an opinion denying the motions for a summary judgment and reserving the ruling on the motions to dismiss which was based on the statute of limitations.

In that opinion of September 20 of this year you Honor stated:

“The issue of the statute of limitations, however, should be resolved preliminarily upon a separate trial. Rule 42(b) Rules of Civil Procedure:

“I am of the opinion that the interests of justice and of the parties will best be served if this issue is determined before litigating the larger issues involved in the merits of the controversy.”

Your Honor then gave the defendants permission to file answer on the merits within ten days after setting up the defense of the statute of limitations; and thereupon, either side may move the Court to set the special issues for trial.

Your Honor stated:

“The time of defendants to answer on the merits is extended to a date ten days after the determination of the special issue, if the same is decided adversely to them.”

At the last hearing of this matter your Honor set the trial of the special issue for February 4.

Now, if the Court please, to refresh your Honor's recollection on still another matter which will at once come to your Honor's mind, our original motion here based on the statute of limitations was in part a motion to dismiss on the face of the complaint; in other words, it was grounded on the proposition on the face of the complaint the cause of action was barred by the statute. We also added pursuant to this stipulation a motion for summary judgment on the ground that facts shown by affidavit showed beyond the possibility of question that irrespective of all other questions in the case it was demonstrated that the plaintiff knew—and in the meantime the statutory period began—and believed that the cause of action existed and that therefore whatever view might be taken of the motion to dismiss, upon that ground that, as I say, the plaintiff knew and believed that he had a cause of action, the motion for a summary judgment should be entered.

Your Honor took the view that a summary judgment should not be entered and reserved the matter of the ruling on the motion to dismiss.

The plaintiff has demanded a jury trial. I might say at the outset that we entertain some doubt as to whether there is a right to a jury trial as far as the issues here presented are concerned. So we do wish to state at the present time that we are not consenting to a jury trial, because in proceeding without making that statement it might be deemed we were consenting to a jury trial, as a matter of law under Rule 39(c); but the essential difficulty



about a defense on the statute of limitations arises from the nature of the facts that are relied on by the plaintiff to obviate the period of the statute of limitations. If the issue were one being tried before your Honor those difficulties would not be so serious. In other words, if we were before your Honor on the issue, "Did the plaintiff believe more than three years before 1942 that a cause of action under the Sherman Antitrust Act existed?" your Honor could determine that question with a mind judicially trained and apart from the issues in the case; but when it comes to submitting an issue of that kind to the jury we have here the situation where upon the face of the complaint, and unless some excuse be shown, the cause of action is barred.

We assume that your Honor would rule, because there has been no question raised on the point seriously by the other side, but we are confident of our position at any rate if such a question is raised, that the statutory period is three years requiring a suit within that time. Also, the cause of action here is a cause of action which arises from injury done to the plaintiff as the result of an infringement of the Sherman Antitrust Act directed against him and that, therefore, as to one item of damage set forth in the complaint, to-wit, the destruction of the plaintiff's mail business by reason of the mail fraud order in 1924 which is alleged to have destroyed that particular phase of his business in 1924, the period of the statute would run from 1924 or 1925, when that injury occurred.

As to the injury alleged in the complaint with respect to the price cuts where it is alleged that by reason of certain price cuts in the year 1928 the plaintiff's business was wholly destroyed in 1929, we would expect your Honor, and I assume your Honor would rule that in the absence of some excuse the period of three years would begin to run from that time. Now, then, it would be that issue that would be presented to the jury or to your Honor.

We are conscious of the fact that your Honor had in mind in making this order trying to avoid the unnecessary expense of a long trial if the case can be disposed of in a short hearing. That necessarily means, and your Honor so indicated in your opinion, that the question of the larger issues, as your Honor described them, the question of whether the defendants were guilty of a conspiracy in violation of the Sherman Antitrust law would not be expected to be tried in this preliminary hearing. Obviously, if we had to go into those issues the trial would be extremely long and no time would be saved and there would be no purpose in having the preliminary trial upon the special issue.

Now, the peculiar fact about this case is that the issues here involved, if tried in full, and if the jury is called upon to render a general verdict as to whether this cause of action is or is not barred by the statute of limitations will necessarily involve the trial of those larger issues. To indicate what I have in mind, the complaint alleges definitely that these acts were done and that plaintiff suffered cer-

tain damage in 1925, that certain other acts were done in 1928, as the result of which he was put out of business in 1928. To obviate the bar of the statute—because if nothing more were said the complaint of course should be dismissed on the ground that upon its face it is barred—the plaintiff alleges, and we have denied by this special answer, in Paragraph 75 of the complaint what seems to be the main ground and it seems to us clear the only tenable ground for voiding the bar of the statute:

“That in May, 1929, said Burnham called upon C. B. Zebriskie, the manager of defendant, Pacific Coast Borax Company, at its office in New York City, and protested against the said cuts by defendants in the price of borax and charged said defendants with so doing for the purpose of eliminating, and with the intent so to do, plaintiff from its operations at Searles Lake and from any competition with the products of defendants; that at said time Zebriskie denied the said charges of said Burnham and claimed that such cuts were made solely by reason of the discovery kernite at the Kramer Borax Fields in Kern County, California, (and which discovery and development is more particularly hereinafter set forth and described), and further stated that defendants had no desire or intention to injury or damage plaintiff; that said Burnham and said plaintiff, believing the statement of said Zebriskie as to the good faith of defendants and the lack of



their desire to injure plaintiff, accepted said statement of said Zebriskie as being true; that in truth and fact said statements of said Zebriskie were false and fraudulent and made with the intent and for the purpose of lulling plaintiff into inactivity and in a further endeavor to eliminate plaintiff as a competitor; that the falsity of said statements was not discovered by plaintiff or its officers until on or about the fall of 1944."

Your Honor will see that the only reliance in the original complaint upon any facts which would obviate the bar of the statute is the reliance upon a statement by an officer of one of the defendants which is said to be false and fraudulent. Our defense could not be eliminated unless it were proved in the first place that Zebriskie made such a statement, and in the second place that if he did make it that the statement was false and it was made fraudulently and with intent to deceive. Then, of course, it would have to be shown also that the plaintiff believed the statement and believed that the price cuts were not the result of any activity prohibited by the Sherman Act. If it were merely proved that the defendant made the statement and plaintiff believed the statement and did not believe he had a cause of action the excuse would not be established.

The Court: This was 1929?

Mr. Harrison: Yes.

The Court: That was the same year the defendant went out of business?

Mr. Harrison: This was in May of the same year. The defendant went out of business in January. I am not speaking for the moment about the question of law which will be presented to your Honor sooner or later, and we think, inevitably on the trial as to whether or not a protestation of innocence by a defendant of wrongdoing can be relied on under any circumstances so as to excuse known action of the plaintiff. But assume for the moment this is an excuse, what question can be presented to the Jury if the plaintiff states that this dead man gave him this assurance that they were innocent of intent to harm him and conspire, and so forth, if the jury believes that, then the jury is next confronted with this: Was it a fraudulent statement made with intent to deceive, and neither the jury nor the Court can reach a conclusion on that issue without deciding whether or not we were guilty of a conspiracy. If we were not guilty of a conspiracy then this is no excuse at all. And the defendant could not safely go before a jury, or the defendant could not safely go before your Honor on the general issue of statute of limitations without presenting his evidence, that if this dead man Zebriskie made the statement, it was perfectly true, or that Zebriskie made it in good faith, and the only way we could establish that would be by showing that in fact we were not guilty of any conspiracy, that in fact we had not agreed with the other defendants to injure this plaintiff, that in fact we had not agreed to monopolize the business and deal this plaintiff out.

Now, of course, on a general trial all of those issues would be before the jury, the statute of limitations and the evidence on the main issue; but if this issue is to be tried separately it would seem that the only question as to which your Honor can get any help from the jury is by way of answer to the complaint as to whether the plaintiff believed after Zebriskie made the statement to him, if he did, whether he would still believe he had a cause of action.

The Court: I think the only question on the statute of limitations, the only matter that the jury or trier of the facts can determine is just a question of credibility and weight of the evidence. Otherwise, I felt I could have really decided this matter on a motion for summary judgment, but there lurked in it matter of weight and credibility of some evidence connected with the issue of the statute of limitations. I have been told once before by the Circuit Court of Appeals that I should not decide a motion for summary judgment when that came up, and in fact they do not seem to like the judges to do that. So I thought it would be best under the circumstances to let either the Court or the jury, as the case may be, say how much weight is to be attached to this man's testimony, or that piece of evidence, and to follow along on that basis. But I do not feel that the trial on the statute of limitations issue in this case should wander all over the main case. It should be precisely limited to what would go to toll the statute of limitations.



Mr. Harrison: I quite agree with your Honor, and because we feel so strongly about that question and the danger of its wandering, that our summation is that what should be submitted to the jury in this case is not the general issue of the statute of limitations, because if the general issue of the statute of limitations is submitted to the jury as such, then it will necessarily and inevitably involve the determination of those main issues that I think we would all agree it is desirable to keep away from.

Now, let me call your Honor's attention to——

The Court: If I may interrupt, I think perhaps you are right about that, that perhaps it would be better to frame an issue for the jury so that both sides can be guided by it, and it could be really determined as to the precise question we will submit. Otherwise, both of you would be disappointed in the result, no matter which way it went.

Mr. Harrison: What your Honor has in mind, I assume, was that there was some issue of fact which might involve the question of weighing the evidence or credibility of witnesses, or the weight to be attached to testimony. Now, as a matter of fact, the only question as to which there could have been any conflict on the motion for a summary judgment was the state of mind of the plaintiff: Did he believe that he had a cause of action back in 1930 or 1931? If he did believe at that time, truly believed he had a cause of action under the Sherman Antitrust law, why, of course, he was out of line, but, on the contrary, in spite of the documentary evidence——

The Court: You are referring now to the Nevada litigation?

Mr. Harrison: Yes, I am referring to that as being, in the words of your Honor, persuasive evidence, but in your Honor's view, not conclusive. If that convinces the trier of the fact, whether Court or jury, if at that time he believed he had a cause of action against the defendants, why surely, nothing else matters and the issue is disposed of; but the point I am making is this, that the question to be put to the jury should be specific rather than the general issue of the statute of limitations.

Now, I call your Honor's attention in that connection to Rule 49(a):

“The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the Court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence.”

The Court: Have you prepared some forms?

Mr. Harrison: I have some forms, but they are not in final form. I should say one of the questions which ought to be submitted to the jury under the pleading is, “Did Zebriskie in May, 1929, make the statement alleged in Paragraph 75 of the complaint?”

Secondly:

“Did the plaintiff believe at any time after Zebriskie’s statement that the defendants had violated the antitrust laws to plaintiff’s damage?”

Three:

“Did the plaintiff have this belief after Zebriskie’s statement and before October 10, 1939?”

That date, if your Honor please, October 10, 1939, is years before the statute was extended by act of Congress.

Fourth:

“Did plaintiff refrain from suing before he did sue because of, or in reliance upon Zebriskie’s statements?”

Five:

“Was his reason for not suing lack of funds?”

The Court: That last one is argumentative, I suppose.

Mr. Harrison: All right. These are only suggestions, if your Honor please, but they indicate the nature of the questions to be submitted to the jury. I am not prepared to say that we could not improve on those, but I am indicating what we have in mind.

Now, let us take one other question, and that is the question of the allegations of Paragraphs 81(a) and 81(b), which were added by amendment to the



complaint. Your Honor will remember there were general statements in the amendment to the complaint alleging, in the first place, lack of knowledge of the offenses charged, which we believe to be legally immaterial, and also alleging that the defendants had altered their records so as to conceal—and it was just about that brief—so as to conceal the conspiracy.

There again you have a case where, if the general issue were submitted in general form to the jury, the jury could not find there had been any concealment or a conspiracy, unless they were convinced there was a conspiracy. There is no indication as to the nature of the things that were concealed. There is no statement that the concealment occurred before the statute had run, and certainly the concealment would be immaterial if the statute had already run. There is no statement nor any claim that the plaintiff was prevented by the concealment from gaining a knowledge of the facts and that it was a trick or device which operated against him, that he ever sought to look at any records or papers or documents. So that until some claim is made, until the issue is defined as it was claimed in that respect, it is difficult to see how you can get any specific question beyond the question as to whether the plaintiff believed at any time before October 10, 1939, that he had a cause of action against the defendants under the antitrust law. I don't see how he can at this time define a specific question on that because there has been no specific claim. We don't know what we are talking about at this juncture,

and we won't know until the plaintiff indicates, but certain as a matter of law we ask your Honor to rule that a change in the books or concealment or destruction of records or any act of that kind which did not come to the plaintiff's attention, which did not interfere with any inquiries of his and which had nothing to do with his investigation, if any, cannot have any effect on the case.

The Court: I don't think there would be very much question about that as a matter of law.

Mr. Harrison: And also, once the statute of limitations had fully run, the act of concealment would be immaterial, and I believe the cases are fully in accord with that.

The Court: I am somewhat impressed with the necessity of submitting some specific inquiry or inquiries to the jury so that we don't convert this trial of a special issue into a trial of the case, Mr. Carr.

Mr. Carr: I agree with you fully. That is perfectly agreeable. I am convinced when the time comes your Honor will so do.

Let me say preliminarily that this is an attempt on the part of Mr. Harrison and counsel to rear-gue, and by a very able argument, these matters that have already been submitted to your Honor on this question of the right of the defendants to claim the statute of limitations.

Now, what has happened here, as we see the situation, is this: We are suing under Section 15, the treble damage section, and that section provides that anyone injured by a violation of Sections 1 and 2



of the Act can sue for these treble damages. There is no question but what on the bare statement of all the facts, the statute would have run unless we did allege and prove some excusatory facts.

The law of the State of California is that in the case of fraud of this character, or not only in case of fraud, but of deception and concealment, the statute does not begin to run until discovery. Now, our position is this: When were we charged with this discovery? When did we make this discovery of this conspiracy and of these charged actions of the defendants? We contend that we, of course, did not know of the real facts of the case until the Government brought its action here in 1944, and that while we knew we were being pushed around and kicked around by these people, we had no knowledge of the conspiracy. The real basis of our cause of action, as we have stated to your Honor before, was the violation of Section 1 and 2, which is a conspiracy to monopolize, or a conspiracy in restraint of trade.

The Court: Then, you say the question on the statute of limitations issue is a factual decision of the factual question as to when the plaintiff actually discovered the alleged conspiracy?

Mr. Carr: Yes, your Honor.

The Court: So that then could not we submit some inquiry to the jury substantially to this effect:

“Did the plaintiff actually discover or notice the alleged antitrust conspiracy prior to October 10, 1939?”



Mr. Carr: Subject to the correct date, but what we believe, your Honor, is this, that the matter stands, and it is our position that unless we can make good our excusatory allegations, of course, the statute will have run, but as we see it, the situation is this: There are three things that must be considered as to the plaintiff: "Did the plaintiff have actual knowledge of its intent to conspire and to injure?"

Of course, the answer here is "No, they did not," and secondly——

The Court: Isn't that the question that has to be determined, that is, as to the time element on this particular?

Mr. Carr: Yes, the question is, first, did we have actual knowledge, and secondly——

The Court: And secondly, when did you acquire it?

Mr. Carr: And secondly, when did we put on notice of these claims of malfaactions? And, third, when did we actually discover these situations of which we complain?

The Court: Doesn't that simmer down to the one question to be submitted to the jury, because the one question that we have to determine in this case is a time question.

Mr. Carr: Not entirely, no, your Honor.

The Court: The statute of limitations means time.

Mr. Carr: Yes, it does, but the point of beginning of that time is important.

The Court: But isn't the ultimate inquiry the time in question for the jury to determine, when did the plaintiff acquire the knowledge or notice of the alleged conspiracy that he complains of in his complaint?

Mr. Carr: That is it exactly.

The Court: And if the jury answers that question as to any date prior to October, 1939, why, then, the judgment of the Court will be that the action is barred by the statute of limitations.

Mr. Carr: No, your Honor, that is just what counsel is endeavoring to have your Honor come to the conclusion, but that is not correct, because, for instance, the first question is, did we have actual knowledge of this conspiracy? Then, the next question arises: Were we put on knowledge of this conspiracy, and if so, when? Because the statute would then begin to run from that period against us, and if we were not put on knowledge of it, then after that comes the question: Did we exercise reasonable and proper diligence to discover the facts?

Those are the provisions and holdings of these California cases which have been cited to your Honor.

We are chargeable with that statute, may it please your Honor, from the date when we were put on notice, and if we sat down and did nothing at that time, why, we would be chargeable from that time; but if we pursued in good faith an inquiry into the facts and did not discover the real existence of such facts until the subsequent date, the discovery would be, or period of time in which the statute would be-

gin to run would be from that date. I don't think there can be any question of that under the California cases as to the tolling of the statute by fraud.

The Court: Do you think that more than one inquiry is necessary to be made of the jury?

Mr. Carr: Yes, I think your Honor would ultimately give to the Jury three questions:

"1. Did the plaintiff have actual knowledge of this claimed conspiracy within three years prior to the commencement of the action?"

Then if the answer to that is "No," then comes the question:

"2. When was the plaintiff put on notice as to the existence of such a conspiracy?"

And from the date the statute would begin to run.

The question of whether or not the plaintiff exercised due diligence as to the discovery of the facts would then be submitted, and then the question:

"3. When did plaintiff discover the real facts?"

Then the next question might be this:

"Did the plaintiff use due diligence in the discovery of these facts subsequent to the date when he was put upon notice?"

That is the law, if I may so boldly state it to your Honor, as set forth in those California cases. If we have no facts which put us on notice of this conspiracy or intent to damage, we of course are not chargeable with the statute. It is disclosed a suspicion arises—take the Nevada case—from the day



from which our suspicion arises we must then use due diligence and every diligence possible within our power to discover the facts, and then the statute is tolled if we are in good faith examining into the facts until the date of discovery, and there, of course, could be no action without discovery.

I would like to state also preliminarily that there was no objection as to a motion for jury trial or demand for a jury trial. There was no objection to the setting of this matter as a separate trial on the question of the statute. I think if my memory serves me correctly that in Counsel's brief, they asked if your Honor should deny the motion that a separate trial be given on the statute of limitations.

The Court: Mr. Harrison was not making that point. He was making the point he had not consented to a jury determination at any time.

Mr. Carr: But he was also raising this as a new point, too, to the effect, after all they had never consented to the separate trial, but of course, they had.

The Court: I did not understand him to say that.

Mr. Carr: If I am in error I ask your pardon.

The Court: I understood him to say that he had not consented at any time to a jury determination, isn't that right?

Mr. Harrison: I think Mr. Carr is right to this extent, that we never did stipulate nor request a separate trial of this issue.

The Court: I understood that.

Mr. Harrison: Your Honor has ordered it and we are complying.

Mr. Carr: In your preparation I recalled your suggesting—let me put it that way—your suggesting that if his Honor should decide the motion, the question of the statute should go to separate trial, but I wanted to bring home to your Honor at this time that it is a reargument that was given by Mr. Harrison today on all of the questions that have been presented to your Honor. Our only defense to the statute of limitations is the excusatory allegations which we have in our complaint and coming under those California cases of fraud and concealment.

Now, your Honor has given them the privilege to plead specially as to this, and that they have done. They have denied those three paragraphs of our complaint, Paragraphs 75, 80 and 81.

The Court: That has to do with the so-called Zebriskie incident?

Mr. Carr: Yes, your Honor, and the concealment, and I would like to raise one more point here just so Mr. Harrison and counsel will be advised. I think, if you will notice in the answer they do not deny the allegations in reference to Zebriskie. All they say in their answer is they have no knowledge of whether it is true or not, but they don't deny it on that ground. I think if you will examine that, you will find that is a fact.

The Court: That man is dead.

Mr. Harrison: That is an answer.

Mr. Carr: But you don't deny it. You say you have no information or belief, but you don't deny it.

The Court: You mean that he places his denial on that ground?

Mr. Carr: But there is no denial. I am perfectly willing to let it stand as it is, and if counsel is satisfied, I am, but I merely made that point here so I did not take Counsel by surprise at the trial. So, our suggestion or thought on this procedure, your Honor, is that the issues are now raised. The statute has been pleaded in many different ways and through many different sections. They have also denied what they term the "excusatory," or what we would designate the "excusatory" allegations of our complaint.

Now, we therefore go to trial with an admission of all of the allegations of our complaint except the denial as to these three paragraphs, so what the jury would have, what your Honor would say to the jury is, "For purposes of this proceeding alone all of the allegations of the complaint except these three paragraphs are admitted."

The Court: I would not want to do that, Mr. Carr.

Mr. Carr: But they admit all the allegations by the motions and by the pleas.

The Court: No——

Mr. Harrison: No, we do not.

Mr. Carr: I can give you many cases on that——

The Court: That may be a matter of pleading, but on the question of the trial of the special issue,



I am going to submit only an issue of fact. I am not going to tell the jury that there was a conspiracy in this case.

Mr. Carr: No, you don't tell them that.

The Court: Or permits them to have that inference. I will restrict them to the determination of the knowledge of the plaintiff, because that is the only question of the statute of limitations that is involved.

Mr. Carr: A motion to dismiss is in the nature of a demurrer, and for the purpose of the motion the allegations of the bill must be taken as true. There are many cases on that point, both state and federal, which I would be glad to give to your Honor. But your Honor, irrespective of that, can protect the rights of the defendants by telling them the statute of limitations as pleaded by the defense admits for purposes of the statute only, which is true, the allegations of the complaint. Now, what the statute means and what they mean by pleading it is that, granting for the sake of argument that all of the allegations of the complaint are true, still it is barred by the statute.

The Court: Maybe you gentlemen could exchange suggestions between one another as to the questions to be submitted. I don't think we should give even as many as you have suggested to the jury, because it gets too confused. You have to limit matters so far as the jury is concerned. I think if you could work out, if possible, one, or perhaps two inquiries to the jury, which would fairly limit the factual question to be determined, that

would be very helpful. Have you thought of exchanging each other's views?

Mr. Harrison: I will be glad to submit to Mr. Carr and to your Honor the minimum number of questions that ought to be submitted, but we will be in profound disagreement as to what the questions should be and we will have to come to your Honor for that.

The Court: We may run just a few minutes longer and I will take a five minute recess at this time.

(Recess.)

The Court: You may proceed.

Mr. Carr: I don't wish to prolong this unduly. As we see it, the sole question to be presented to the jury on this particular trial is, when did we have or should have had knowledge of this intent to combine and conspire? That is the only question that this jury has to get.

The Court: When is the case set for trial?

Mr. Carr: February 4.

The Court: That is two months or more.

Mr. Harrison: We would like to know in connection with some pre-trial conference, your Honor's attitude towards some of these questions, because that would guide us.

The Court: I think we should rather promptly decide the special issue to be presented to the jury and it would be my endeavor to explain to the jury, somewhat colloquially, the precise matter that they are called upon to determine and why they are

called upon to determine it. I think I should explain to the jury this action has been brought, and preliminarily to the determination of the merits of the controversy, the jury has been summoned to hear and to make a finding of fact as to the question of whether or not the plaintiff's action has been brought in time——

Mr. Carr: Whether we had or should have had knowledge.

The Court: Whether or not plaintiff's action has been brought in time, and in order to aid the Court in determining whether or not the plaintiff's action has been brought in time, it is necessary for the jury to decide one or more precise factual issues and that there will be evidence presented by both sides directed toward that precise, or those precise factual questions, and that it will be then presented with a question or two questions to answer, and they are not sitting in the box for the purpose of determining whether or not the plaintiff is right in his cause, or whether the defendant is right in his cause, but only to determine the precise matter of whether the plaintiff is in time or not. I am just ad libbing, but it would seem to me that some more carefully prepared statement submitted to the jury might keep them well within the boundaries of the precise matter that they have to determine, and therefore it would be important for us to frame these one or two—maybe there should be three, as I am not intending to limit them, but I do think the more we can limit them the more intelligent consideration we will get from the jury—it would be



important for us to frame these one or two or three inquiries, and I think I could frame them myself, but I hesitate to do that, because after all, it is your case, and if you could each submit inquiries, one or two or three, to me, and if you did not object too much, I would choose from those and work out my own inquiries and make that as sort of a decision on pre-trial, and give you notice of that beforehand so as to prepare your case for trial.

Mr. Harrison: I quite agree with all your Honor has said. It is true that in this case I know I have had some difficulty, and in talking with my associates have had some difficulty in determining just what the factual question should be, and it may be that a somewhat further discussion with your Honor after the suggestions have been made might be of some assistance in that connection.

For instance, Mr. Carr has made some suggestions, and I would like to be heard briefly as to what he said, with the hope that when we do submit those questions, you can decide what questions should be put. I think some progress would have been made this afternoon if your Honor reaches the conclusion that your Honor will submit factual questions and not the legal issue of the statute of limitations to the jury, and the issue of fact will be settled by your Honor at some subsequent date after we have each submitted the proposed questions.

Now, when Mr. Carr is finished, I would like to address your Honor on five or six matters.

Mr. Carr: Don't you think we'd better postpone this until we get into this? Why don't you propose the thoughts and suggestions you have and I will propose the thoughts and suggestions that I have?

The Court: If there is anything you feel you want to say to me, I would rather have you do it, because I don't know when I am going to have time to hear you again.

Mr. Harrison: I think our denial is good under the rules, and I don't think we suggested a separate trial, but your Honor ordered it, but we are trying to suggest something fair to the parties by way of separate trial, and if your Honor should conclude there should be something to the separate trial, your Honor could order it, but the question before the Court is, how can issues be framed to the jury that are fair? After all, this much is clear, and Mr. Carr admits it, damage occurred in January of 1929, and if it had not been for excusatory matters, the statute would have run three years after that date.

Mr. Carr: Right there is where we have been diametrically opposed from the beginning. We do not admit the statute begins to run from the date of damage, and you have been insisting on that always, and we say, "No, our cause of action arose out of the violations of Sections 1 and 2," that involved the question of intent of the matter. These instances to which you refer are merely a measure of damages. We technically had defenses from the date you formed your conspiracy.

Mr. Harrison: If the Court please, I won't charge Mr. Carr with any admission. I thought he had admitted and I thought the question before us was excuse that would prevent the statute from running. Our position is this, that when you have a violation of the Sherman Act, no matter how long it is continued, there is no cause of action until such time as that conspiracy impinges on the plaintiff's rights, and when it does, and when the damage has been done, the statute begins to run, and therefore, so far as the price cut is concerned, the statute began to run in January, 1929. We say further, and I am not charging Mr. Carr with admitting this, but the law is clear, once the statute begins to run, it begins to run wholly irrespective of the plaintiff's knowledge.

In this case we think it perfectly clear the statute began to run wholly irrespective of knowledge in January, 1929. To toll the statute, the plaintiff alleges a fraudulent statement in May of 1929, and we say it is a question of fact and an issue under the pleadings whether the statement was made. It is also an issue of fact very clearly presented by the affidavits, whether after the statement was made, and at any time prior to 1939, that plaintiff, notwithstanding the statement was made, nevertheless believed he had a cause of action. If either one of those two questions, if the first or second question is answered in the negative, that is determinative of the case, but it is not a question of knowledge, and if the interrogation is put to the jury in the form of knowledge, then we are assuming there was a conspiracy, and any summation of the case



to the jury which assumes our guilt on the issue of conspiracy is unfair to us.

Now, if the Court please, suppose your Honor tells the jury, "We will assume for purposes of the trial, although the matter will be tried later, we will assume there was a conspiracy as charged"; what follows from that? Once they find Zebriskie made the statement—Zebriskie is dead, of course, but once they find Zebriskie made the statement, then it will follow inevitably that they must assume and believe that the statement was false, having been made, or if it was made by a person having knowledge that it was fraudulently false and yet we would not have had the opportunity to show, as we could show, upon a full trial, that the statement was true or that it was made in good faith. So if the question is put in the form, "Did the plaintiff have knowledge?", or, "When did the plaintiff first have knowledge?", or, "Did the plaintiff discover?"—that assumes he had knowledge of a conspiracy which existed. It assumes he discovered something which existed, and then we are put before the jury in a prejudicial light of not only having violated the law, but also of having misstated our innocence, and having lied and of having deceived.

I submit, if the Court please, the issue of fact upon which the Court thought there might possibly be a conflict or different inferences as to the state of the plaintiff's mind, and that can be decided entirely apart from the merits of the case, or existence of a conspiracy—"Did he believe more than three years before 1942 at any time after the state-

ment was made, did he believe he had a cause of action?"

Do I make my point clear to your Honor?

If the issue is put as to notice on discovery on any theory that there was something to know or something to discover, then the jury must infer we were guilty of a conspiracy. We are entitled to know, before becoming precluded by the defense theory of statute of limitations, whether Zebriskie told the truth, and yet we are not allowed to go into the merits on the special issue.

Our contention is that the proper question to the jury in the light of the affidavits and so forth is whether the plaintiff believed after the Zebriskie statement was made and before 1939 that he had a cause of action against the defendant under the Sherman Antitrust law. If he had so believed, then his cause of action would be barred, and the jury verdict would be of help.

The Court: I follow you on that.

Mr. Carr: It is not a question of belief; it is a question of, did the plaintiff have knowledge, or should he have knowledge from the facts presented, then he believed, because he may have believed in his mind the conspiracy existed, but he didn't know it existed. Did he know or should he have known from the facts presented that this conspiracy existed? It is not a question of belief; it is a question of knowledge—did he know?

The Court: What is the difference between you on that? Mr. Harrison says, "Did he believe he had a cause of action?". That is the same as, "Did he know?".

Mr. Carr: No, he might believe, but he wouldn't know the facts.

The Court: How can a person believe he has a cause of action unless he had something to base that on?

Mr. Carr: No, he would not believe he had a cause of action, but he would believe that these defendants were not to be trusted, just as Burnham says, but the only question here is whether he had knowledge of the conspiracy which is the basis of the cause of action, or should he have known from all the facts that the combination existed. That is the real issue.

Has your Honor seen this comparatively late case of American Tobacco Company vs. the United States, cited in 66 Supreme Court Reporter 1125, and it was decided on June 10 of this year?

The Court: One of the last cases the Supreme Court decided.

Mr. Carr: And in it they quote 140 Fed. 2d., 416. There it lays down the rules and they cite:

“In order to fall within Section 2, the monopolist must have both the power to monopolize and the intent to.”

They go on to say that “to read the passage as demanding and specific intent makes no sense, for no monopolist monopolizes unconscious of what he is doing,” and that goes to our contention that the basis of our cause of action here is the conspiracy, the violation of Sections 1 and 2 of the Act.



The Court: Mr. Harrison says, "Did the plaintiff believe that the defendants were guilty of a conspiracy under the Antitrust law before October, 1939?"

Mr. Carr: No, belief is not knowledge. All the California cases on the tolling of the statute by fraud don't hold that.

The Court: What is it?

Mr. Carr: It is belief, not knowledge.

The Court: What is the difference between them?

Mr. Carr: A man might think a wrong is being done him, that these people are conspiring, that these people must have made an agreement among themselves, but knowing is another thing.

The Court: But suppose he says he knows in his own mind the defendant had a cause of action?

Mr. Carr: No, it is, did he know or should he have known he had a cause of action?

The Court: I might say to you that when I was in New York I got quite a description of the famous aluminum case. I spent some time with the district judge who decided the case and he showed me his library he accumulated in connection with the trial of the case. He told me the case had occupied some two years and the record he had, comprised without the exhibits in the case, some fifty-five thousand pages of transcript. He told me that he had kept the matter under advisement, studying the briefs and records, something in the neighborhood of a year, and then when he did decide the case, it took him nine days to read his opinion from the bench. He was reversed by Judge Learned Hand in the case.

I have a feeling of prejudice in favor of the district judges, and I think he really did the real spade-work in the case, even though there was a decision to the contrary. In that case he had to do a tremendous amount of work. It seems to me there is something wrong with our system in the administration of justice that a case has to take these three years in actual trial in court. It does not seem to me there is any controversy that should occupy a court that long.

Mr. Harrison: In submitting these questions I suppose your Honor has no objection to a brief comment.

The Court: No, but would you mind sending in the questions and briefly state your reasons in support of them as being proper inquiries to the jury, and questions which would elicit the factual result that would enable the Court to determine the factual situation?

Mr. Harrison: One other thing, as to questions of admissibility, your Honor may feel those are questions to be determined at the trial, but there may be no harm in suggesting to your Honor if the direct evidence to the particular point may be admissible, your Honor may indicate your view.

The Court: It is rather difficult to do that. I hesitate to make these academic rulings.

Mr. Harrison: This is a little different from the ordinary case because we have submitted affidavits. There are certain matters that if we have to meet, we will meet them.

The Court: Submit any controversial issue that should be submitted, and Mr. Carr will answer.

Mr. Harrison: Is it agreeable to Mr. Carr that we may take the deposition of the plaintiff, George Burnham, and that may be restricted to the statute of limitations, without prejudice to our right later to take it on the general issue?

Mr. Carr: Certainly, but he will not remain here until the middle of January.

Mr. Harrison: Can we take his deposition in the east?

Mr. Carr: No, I don't think so.

The Court: If you take his deposition in the middle of January that will be satisfactory.

I will take this matter under consideration and if I feel that I can intelligently make an order at that time I will do so, or I may even ask you to come out again.

Mr. Aitken: I am in a situation here where Mr. Beardsley is away on his honeymoon. I would want some opportunity to be here personally, or for Mr. Beardsley to be here.

Mr. Carr: We will help you every way we can.

Mr. Harrison: If Burnham will be back sooner we can dispose of the deposition.

Mr. Lasky: I will be east in January and I can take his deposition.

Mr. Carr: No, I want him here.

The Court: Well, at any rate, we will set this case down for pre-trial conference and to be reset on December 30 at two p.m.



## Certificate of Reporter

I, F. J. Sherry, Official Reporter, certify that the foregoing 36 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ F. J. SHERRY.

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[Title of District Court and Cause.]

## REPORTER'S TRANSCRIPT

Wednesday, March 26, 1947

## Counsel Appearing:

For Plaintiff: Stirling Carr, Esq.

For Defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company: Messrs. Brobeck, Phleger & Harrison, by Maurice Harrison, Esq., and Moses Lasky, Esq.; and Paul Sandmeyer, Esq.

For Defendant American Potash & Chemical Corporation: Philip M. Aitken, Esq., and Charles A. Beardsley, Esq.

(A jury having been impaneled and sworn to try the above-entitled cause, an adjournment was taken until tomorrow, Thursday, March 27, 1947.) [1\*]

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\*Page numbers appearing at top of page of Reporter's Certified Transcript of Record.

Thursday, March 27, 1947

10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

The Court: Before the taking of evidence and before statements are made by counsel in this case, the Court will give a preliminary statement and instruction to the jury in view of the special nature of the case and of the matter to be determined by the jury. The Court will do this mainly so that the jury may view the evidence to be presented in the proper setting and will more thoroughly understand the nature of the matter to be determined by the jury.

This is somewhat an unusual procedure, and for that reason I feel it necessary to do that. Each side in this case is represented by counsel who are experienced and able, and they will present their side of the case. The judge is impartial in the matter. What I have to say is not intended to indicate in any manner that I have any view with respect to what decision the jury should make in the case. I have no view on that subject. That is why the case is being submitted on the issue that it is being submitted to you on.

This suit was filed by the plaintiff on July 3, 1945. As you were advised at the time you were impaneled, the suit is by the Burnham Chemical Company, a corporation, as plaintiff, against Borax Consolidated, Ltd., and other named corporations.

The complaint alleges that the plaintiff corporation was damaged because of acts of the defendants in violation of the Federal Antitrust Laws. In gen-

eral, the Federal Antitrust Laws forbid combinations and agreements in restraint of trade and to control prices. The plaintiff in its complaint charges that such a combination or unlawful practice existed as between the defendant corporations, and that by virtue thereof the plaintiff in its business suffered damage.

That issue, however, is not to be decided by you in this case. You are not to determine who is right or who is wrong in the litigation, itself. You are not to decide that the plaintiff is right or that the plaintiff is wrong.

A question was raised preliminary as to whether or not this suit was brought within the time specified by law. That is a legal question for the court to determine. However, in order to aid the court in the determination of that question the court made an order that a certain question of fact should be determined by the jury. The order that the court made was that the following issue was to be submitted to the jury, and I am quoting now from the court's order:

“At any time from May 17, 1929 to October 10, 1939 did the plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Antitrust Laws of the United States?” [3]

After you have heard the evidence in this case you will be required to answer “Yes” or “No” to that inquiry. You will say either that the plaintiff did know or have cause to believe that its business



had been damaged by acts of the defendant, or you will say, "No" to that, depending upon the evidence that is presented to you on that subject. You are not to be concerned with what ruling the court will make as a result of your finding. That will be a matter of law for the court to determine. The issue, therefore, is a very limited one to be presented to you, and the evidence will therefore be limited to that precise question as to the knowledge or cause for belief on the part of the plaintiff that its business had been damaged by alleged acts of the defendants.

You will not be called upon to determine whether the defendants committed any acts in violation of the Antitrust Law or not, but solely the issue as to whether or not the plaintiff had knowledge or good cause to believe that the plaintiff had been damaged by alleged acts of the defendants.

Mr. Carr: In violation, may I add, of the Antitrust Laws.

The Court: I have already said that, Mr. Carr, in violation of the Antitrust Laws.

Now, it is just as important in civil cases as it is in criminal cases that extraneous matters be eliminated, because injustices can frequently be done by considerations given by a jury or a judge to matters that are not part of the issue that [4] the jury or the judge has to determine. It is equally as good law in civil cases as it is in criminal cases. Therefore, you are not to be swayed by sympathy on the one hand or by prejudice on the other hand. You are not to determine whether the plaintiff or

the defendants, respectively, are good people or bad people, or whether they did things that you like or you dislike, because to interpose in the case extraneous considerations of that kind would not be in the interest of justice, and if a verdict were rendered that could be said to be based upon that, the court would not accept it. I say that in order that you may understand that you just have a very simple, narrow issue to consider, and the court will, I am sure, with the co-operation of counsel on both sides, limit the evidence in the case to the very narrow and precise issue which I have stated to you.

I think that is all the court has to say to you at this stage of the proceeding. After the evidence is concluded I will have some further instructions to give you. The matter you are called upon to determine is not without difficulty because of the special nature of the issues to be submitted to you, but the court will endeavor, with, I am sure, the co-operation of the able counsel on both sides, to keep the evidence within the range that will enable you to fairly and impartially determine the precise issue that is to go before you.

The plaintiffs will present its evidence first. Did you [5] have in mind making some opening statement as to what evidence you wish to present, Mr. Carr?

Mr. Carr: I was going to ask leave to read the complaint in lieu of an opening statement.

The Court: No, I think the evidence in this case should be confined to the precise issue which is submitted to the jury. I think the court has suffi-

ciently explained the nature of the proceeding to the jury, and it would be unduly consuming time to do that. I do not wish to tell you how to present your case, but if you wish to outline to the jury the nature of the evidence you are going to present, I think that will be helpful. However, you may just go ahead and present your evidence, whichever procedure you wish to follow.

Mr. Carr: I would like to reserve our right to the reading of the complaint, because our position is, as your Honor probably knows, all the allegations of the complaint, except three, and answers to three of the paragraphs of the complaint, are admitted for purposes of this action and this action alone, this trial, by the defendants. There has been no answer to any of the allegations of the complaint except as to those three paragraphs. True, they have pled the statute of limitations, which in itself is an admission, as your Honor well knows, of all the allegations of the complaint, except those specifically denied. Now, while your Honor did provide in order that they might file a special answer and another answer [6] as the facts may be at the conclusion of this trial, and if such is necessary, nevertheless they did not deny for purposes of this action any of the allegations of the complaint except paragraphs 75, 81-A and 81-B. They did plead the statute. Now, I am prepared to argue that question and submit the authorities to your Honor, but I do not wish to become burdensome or anything, and if your Honor's mind is already made——



The Court: I think your point might be good on a determination of a question of law, but the jury is not called upon to determine any question of law. The point you make would be good if the court were determining, itself, some matter of law in which the allegations of the complaint were assumed to be true, but the jury is not going to determine a question of law here. It is only going to determine a question of fact. So, therefore, the only thing with which we are concerned, so far as the jury is concerned, is the question of fact that is to be submitted to them. I am not going to instruct the jury whether the allegations of the complaint are true or that they are untrue. That is a matter that will be met, if the time arises, upon a trial of the case. This jury is only to hear a specific, precise issue of fact, and this court will make a ruling of law thereafter, after the jury have found the question of fact. So I see no occasion for reading the complaint to the jury or advising the jury that any of the allegations are either true or not true for purposes of this [7] hearing.

Mr. Carr: Your Honor, in your Honor's order you referred to violations of the Antitrust Laws, and I think that would really make it necessary. How would the jury ascertain what those alleged violations of the Act consisted of, whether we had knowledge of those violations, or whether we discovered them, and I think by your Honor's very order you made it necessary that we at least read the complaint and present those facts to the jury. However, as I say, I do not wish to become burden-

some to your Honor or to the jury on this question. If your Honor has already made up your mind, we will simply make our offer and take our exceptions.

May I at this point, before it leaves my mind, except to your Honor's statement to the jury, so far as it refers to the order which your Honor made, and also except at this time to the provisions of that order? As I read the new rules, we have to make all special exceptions to the instructions to the jury, or to any statements of law, and for that reason I am not resting on the general provision as to exceptions, and I think as a matter of precaution we would like to have an exception to that portion of your Honor's statement in which you read to the jury your Honor's order made at the time of the preliminary hearing, the pre-trial hearing.

The Court: I do not quite follow you on that, Mr. Carr. What you wish to take exception to is the order heretofore made? [8]

Mr. Carr: Yes, your Honor, and your Honor's statement to the jury as to the terms of that particular order. We believe it is inadequate, with all due respect, and we would not like it to be stated to the jury without our having an exception to that particular statement.

The Court: Well, the record will show what you mean by an exception.

Mr. Carr: May we have such an exception?

The Court: Yes, exception.

Mr. Carr: As to the other, if your Honor please, at this time we ask permission to read to the jury

both the complaint and the answers of the separate defendants, and base that upon the statements which I have previously made, and also upon the ground that we contend that the defendants have admitted all the allegations of this complaint, except paragraphs 81, 82 and 83. Of course, the plea of statute of limitations admits all of the allegations of the complaint, and in the absence of a specific denial we believe that we are entitled to read on this hearing the complaint and all of its terms, and also further, by reason of the provisions of your Honor's pre-trial order——

Mr. Harrison: We object to that.

The Court: Counsel, if you wish to state the substance of the complaint, I suppose there cannot be any objection to that. I do not see any point in reading this long complaint [9] to the jury. I thought I had stated in substance the nature of the case. Would it add anything to it if you read the long complaint to the jury?

Mr. Carr: Yes, it would show to the jury the violations which we contend, the activities of these defendants, the formation of the 1929 conspiracy to violate the law, the fact that it was not discovered by the plaintiff, such conspiracy, which is the basis of a cause of action such as we have for treble damages, and that we did not discover that until the Government filed its suit here in the fall of 1944, the indictment and the civil suit against these defendants, or certain of them.

Mr. Harrison: We would object, if your Honor please, to any statement leading the jury to believe



that in any way we have admitted any of the allegations of the complaint, because our understanding is clear that upon this trial no such issue was presented, and we would object as misconduct to any statement indicating to the jury that there was any admission of these charges.

The Court: I think that is right, Mr. Carr. That is why I made the opening statement that I did to the jury. This case is not at issue, and I am not going to tell this jury that the defendant has admitted the allegations of the complaint. I haven't any right to say that to the jury. That is a matter for their own decision, and at the present time there has [10] been either no denial or no admission of the statement in the complaint, and I am not going to tell the jury that such is the fact when it is not, for purposes of law or any purpose, because that is not the question, and if the jury were to found its decision of the issue that is to be presented to it on the basis that the defendants are guilty of the charges that are alleged against them, I would not accept the verdict, because I would not be giving the defendants their day in court on the merits of the case, and I think we all understood that before, Mr. Carr, and that is why I was particular to tell the jury that they are not to consider extraneous matters. They are not concerned with whether the defendants are guilty or not guilty of the allegations in the complaint, or whether they are true or whether they are not true. I thought we had thoroughly, at the pre-trial hearing, understood that. There was a request for a jury trial on the

special issue relating to the issue of fact upon which the court might rule as to the statute of limitations, and that is all that this jury is going to hear in this case, and we decided that once before.

Mr. Carr: You sustain an objection, then?

The Court: Yes, I do.

Mr. Carr: May we enter our exception?

The Court: Yes.

Mr. Harrison: If your Honor please, inasmuch as I anticipate that a good part of the defendants' case will be [11] shown on the cross-examination of the plaintiff's witness, I believe it would be helpful to the jury, and we should like to ask the privilege of making now a statement to the jury of the facts which we intend to show in support of our contention that this question should be answered in the affirmative.

I understand that counsel does not desire to make an opening state?

Mr. Carr: I did not say that. [11-a]

Mr. Harrison: At any rate, we ask the privilege of making an opening statement.

The Court: Do you wish to make an opening statement, Mr. Carr?

Mr. Carr: A very short one, yes.

The Court: You may do so.

#### Opening Statement on Behalf of Plaintiff

Mr. Carr: May it please your Honor, and ladies and gentlemen of the Jury, we contend in this matter and we allege in this matter that the defendants violated the antitrust laws and as such inflicted severe damage on us.

We will show we had a plant with an investment of over a million dollars at Searles Lake for the manufacture first of borax and after of sodium and potassium and other salt, and that these defendants conspired among themselves not only to ruin plaintiff and destroy his business, but to control absolutely and create a monopoly of borax and borax products.

We will show that just the week we started commencing business down there manufacturing borax and shipping it in small packages, and our product was known as "Cinderella", we will show the first week we commenced operations the defendants lowered the price of borax so that it made it impossible for us to go ahead and carry on and perform our work.

We will also contend that we did not know of this conspiracy [12] or this fraud or this endeavor to put us out of business until the Government filed its suit here in this court in September of 1944, charging, first, that these defendants——

Mr. Harrison: If your Honor please, we object to any charges made in some other suit against some other persons.

Mr. Carr: That is the basis of our contention. We never knew the facts until the Government filed its suit.

Mr. Harrison: We object to that statement and assign it as misconduct.

The Court: The last part of the statement is all right.



Mr. Harrison: That may be, yes, but any description of any allegations in another suit certainly is not——

Mr. Carr: The whole thing turns around when did we discover this conspiracy and fraud which gave us the cause of action.

The Court: That only calls for a date.

Mr. Carr: We have to describe how we discovered it.

The Court: You have already stated it when the Government filed its suit.

Mr. Carr: When the Government filed an indictment and when the Government filed the suit——

Mr. Harrison: Now, I again assign that also as misconduct, may it please the Court, and as an attempt to get before the jury matters that are not proper to this question.

Mr. Carr: It is all proper, Mr. Harrison, the whole story [13] is proper.

The Court: Please, gentlemen: Ladies and gentlemen of the Jury, the lawyers always get into these arguments and waste time.

Mr. Carr: They do.

The Court: Please proceed with your argument.

Mr. Carr: We will further show, ladies and gentlemen of the Jury, that it was not until September of 1944 that we actually learned of these violations by the defendants of the Antitrust Laws on which our cause of action is based; and we will also prove that during all of that interval from the destruction, from the ceasing by the plaintiff of its business until September, 1944, Mr. Burnham and

the plaintiff endeavored to ascertain whether these violations had existed sufficient to enable them to bring an action against these defendants, but it was not until 1944 in September thereof, at the time I have stated, that we actually learned what the facts were and we really had a cause of action.

The evidence will show we knew what was happening to us and we knew we were being kicked around and lots of things were occurring that were unexplainable to us, but we never knew nor ascertained we had a cause of action until the situation was presented in 1944.

We will also show that these defendants, or the larger ones, the Borax Consolidated Company, the Pacific Coast Borax [14] Company, United States Borax—and the head office, the really controlling power, was in London—and we will show the United States Government itself did not know of these violations and did not discover them until shortly prior to the filing of the proceedings to which Mr. Harrison has referred in this court in September of 1944. Therefore, the statute did not begin to run against us until we discovered the actual conduct and the formation of this conspiracy to monopolize and to control prices, all in violation of the Anti-trust Laws.

The Court: Mr. Harrison?

Opening Statement on Behalf of Defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company.

Mr. Harrison: May it please your Honor, and

ladies and gentlemen of the Jury, as His Honor has told you, the question which is submitted to you is this:

“At any time from May 17, 1929, to October 10, 1939, did Plaintiff know or have cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Antitrust Laws of the United States?”

The defendants will offer testimony for the purpose of showing that the answer to this question should be “Yes”, that [15] during this period of time the plaintiff did believe and did have cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Antitrust Laws.

Now, the question relates to what the plaintiff knew, or had cause to believe during the period which began almost twenty years ago in 1929. Many of the people who participated in those transactions are dead. In showing what the plaintiff knew, or had cause to believe, we shall rely upon evidence of what the plaintiff did, and also upon letters and documents which the plaintiff, or its President, George B. Burnham, wrote and signed. The documents which he signed and to which he swore are rather long and the burden of listening to them may be somewhat tiresome, but I hope by a brief statement now of some of the surrounding facts which we expect to prove and by a reference to some of the more important documents, to be of some help to you in understanding the evidence.



The defendants in this case fall into two groups. On the one hand there is the American Potash & Chemical Corporation, represented by Mr. Aitken and Mr. Beardsley. That company we call "American Potash".

On the other hand there is the group of companies we represent, the most important of which is the Pacific Coast Borax Company, and the others of which are United States Borax Company and Borax Consolidated, Ltd. The operating company [16] of this last group was the Pacific Coast Borax Company. At all times with which we are concerned, American Potash and Pacific Coast Borax Company were the largest producers of borax in the United States. There was this fundamental difference between them: Pacific Coast Borax produced its borax from mines, first in Death Valley, and after 1926, from the mines in the so-called Kramer District in San Bernardino County in this state; whereas American Potash extracted borax as well as potash, from the brines in Searles Lake, a large dry lake located in Inyo County, in this State.

The plaintiff, Burnham Chemical Company, was incorporated in the year 1921. It secured a lease from the Government on a part of Searles Lake——

Mr. Carr: May I interrupt? Counsel is referring now to activities in 1921. Your Honor has restricted the hearing and the evidence to the period between May 17, 1929 and October 10, 1939, and we object to Counsel going beyond the provisions of your Honor's ruling and order.

Mr. Harrison: I am stating only background facts, what we had before your Honor on questions arising on the deposition, the question whether we could show as we shall with your Honor's permission, what the plaintiff knew before 1929 as well as what he knew during this time for the purpose of showing what was in his mind in the material period.

Mr. Carr: We renew our objection. Of course, if we are [17] going to open the whole field, we ought to let the plaintiff tell the whole story.

The Court: I don't see anything objectionable in this preliminary statement of the facts.

Mr. Harrison: The plaintiff, Burnham Chemical Company, was incorporated in the year 1921, as I have said. It secured a lease from the Government on a part of Searles Lake and planned to extract borax from the brine of the lake by a process of solar exaporation. At all times from the date of its organization until the present time, George B. Burnham was its principal stockholder and its president and executive manager.

We shall show that on June 20, 1925, the Postmaster-General of the United States issued an order——

Mr. Carr: Now, we renew our objection to any reference to any activities prior to the time set by your Honor in the pre-trial order.

Mr. Harrison: Your Honor——

Mr. Carr: If there be impeachment, and that is one thing, all right, but the direct proof is another thing, and they have no right at this time to make

any statement as to any facts which they intend to prove unless it antedates May 17, 1929. That is in accordance with your Honor's question.

The Court: Wasn't that one of the questions I had to consider on the motions in connection with the deposition?

Mr. Harrison: Yes, your Honor. [18]

Mr. Carr: That was a different question entirely then.

The Court: Well, let me put it this way: Should not a litigant be given the opportunity to prove that between 1940 and 1944, for example, he had knowledge of the fact because of the fact that before 1940 he had knowledge of it?

Mr. Carr: Not under your Honor's order. That might be used for impeachment, but that does not constitute a proper statement at this time of what they are going to prove. Suppose no reference was made to the mail fraud order case: they would have no right to bring it in under your Honor's order. It would be only in the case of impeachment if you are intending to impeach the witness.

Mr. Harrison: We are not offering it for purposes of impeachment.

The Court: I don't quite follow that argument.

Mr. Carr: Why, if a man testifies he has no knowledge on a certain date, say, May 17, of violations and then they would have a right to impeach him by prior testimony as to prior activities, they would have no right——

The Court: But all the defendant is doing is telling what evidence he is going to present to dis-



pute the plaintiff's evidence. I don't know what impeachment has to do with that.

Mr. Carr: He cannot present any evidence as to the mail fraud order unless it was impeachment.

The Court: I think the defendant has a perfect right to do the same thing that you are going to be permitted to do. You are going to be permitted to present evidence that you did not have any knowledge. Now, the defendant comes along and says, "I want to present evidence he did have knowledge".

Mr. Carr: That is purely impeachment.

The Court: Why should the Court in the interests of justice permit one side to show one side of the evidence and prohibit the other side from showing the contrary?

Mr. Carr: That is anticipating impeachment. That is the objection.

The Court: I will overrule the objection.

Mr. Carr: Very well—exception.

Mr. Harrison: We shall show that on June 20, 1925, the Postmaster-General of the United States issued an order reciting that the plaintiff, Burnham Chemical Company, and George B. Burnham, its President, were engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretences and promises in violation of the laws of the United States, and directing that all letters addressed to him should be returned to the senders with the word "Fraudulent" stamped on the outside of such letters. This order was directed to the Postmaster at Reno, Ne-

vada, where the principal office of the plaintiff was located. This fraud order interrupted the plaintiff's campaign [20] to raise money by stock subscription and its plans to develop its business. The plaintiff, Burnham Chemical Company, thereupon filed a suit against the Postmaster at Reno, in the District Court for the District of Nevada, for the purpose of enjoining the enforcement of the fraud order, employing as his lawyers for that purpose, Mr. Francis J. Heney and Mr. B. D. Townsend, who were well known by reason of their experience in prosecuting under the Antitrust Laws.

On April 14, 1926, the plaintiff filed his amended complaint in this suit against the Postmaster. This complaint was sworn to by Burnham, as the President of the Burnham Chemical Company. We shall offer the complaint in evidence for the purpose of showing just what the plaintiff knew and believed on April 14, 1926, when the amended complaint was filed. The amended complaint is a long one, but the passages which bear upon the plaintiff's knowledge and belief are clear and unmistakable. They show in April, 1926, Burnham and his company charged and believed that the present defendants, American Potash and Pacific Coast Borax, had conspired to obtain the issuance of the fraud order for the purpose of driving the Burnham Company out of business; that they constituted a monopoly and conspiracy in restraint of trade, all in violation of the Antitrust Laws of the United States. In this amended complaint, the plaintiff called on the United States Government to prosecute these defendants under the [21] Antitrust Laws.

This was in April, 1926. In October of the same year, one of Burnham's associates and a director of the Burnham Company, Mr. C. W. Whitney, received a letter from Stephen T. Mather, who was at that time Director of the United States National Park Service. This letter was dated October 8, 1926, and stated that Mr. Mather was largely responsible for having the fraud order issued against Burnham in connection with what Mr. Mather called Burnham's "indiscriminate efforts to sell stock to men, women and children all over the world". This letter was dated October 8, 1926. It came to Burnham's attention a few weeks later. Burnham alleges in this suit that Mr. Mather had previously been the Chicago manager and representative of the Pacific Coast Borax Company. He also knew that Mather was the president of the Sterling Borax Company, which had connections with the Pacific Coast Borax Company.

Upon receiving this letter he was confirmed in his belief, already expressed in his amended complaint, that the fraud order had been brought about by these defendants, and from the time he learned of the letter right down until after '39 he attached the utmost importance to the letter as showing who was responsible for the injury his company had suffered. He had the letter photostated; he placed it in a safe-deposit box where he preserved it for years; he took it out of the [22] safe-deposit box and brought it with him on the many occasions between 1929 and 1939 when he went east to present his grievances against these defendants. The Burn-



ham Company attached so much importance to the Mather letter as showing the cause of the Post Office fraud order that in the following year, 1927, Whitney called on Mather in San Francisco for the purpose of ascertaining whether Mather was acting on behalf of the defendants. He was not satisfied with Mather's reply, and neither was Burnham. In the meantime, the injunction suit in Nevada dragged on, the delay being partly due to the Burnham Company's lack of funds.

In June, 1928, after years of stock selling and experimentation, the plaintiff, Burnham Chemical Company, began to produce borax at Searles Lake. In this very month when Burnham started production, a most remarkable development occurred. Borax had been selling at a price of \$75 per ton, and in the whole history of the industry, its price had never been much below that figure. In the very month that Burnham started production, these defendants, American Potash and Pacific Coast Borax, both simultaneously cut this price by one-third. In succeeding months they further reduced the price so that at the end of 1928 it had reached an unprecedented low. The effect upon the Burnham business was immediate and disastrous. The low price was below its cost of production; it could no longer sell borax at a profit; and as the result [23] of the price cut, it was compelled to, and did, shut down its plant permanently in January, 1929. Plaintiff, of course, knew of the price cuts; it knew that the cuts had been made by American Potash and Pacific Coast Borax simultaneously; it knew

that the initial cuts had been made in the very month when it started production; and it knew that the price cuts destroyed its borax business.

Immediately upon the occurrence of the price cuts in June, 1928, Burnham consulted his attorney, Townsend, and in the following month, on July 26, 1928, Mr. Townsend wrote a letter to a lawyer friend, Mr. Stanley Hinrich, in Washington, indicating his belief that the price cuts constituted a violation of the Antitrust Laws and stating that he was inclined to think that the competition was designed by the controlling heads of the two concerns, which are located in England, for the express purpose of killing off threatened competition, although their subordinates might not know that to be the fact. Townsend gave Burnham a copy of this letter.

Later in the same year, and on November 13, 1928, Townsend wrote Burnham an opinion letter expressing his belief that the price cuts were collusive and intended to destroy the Burnham Company, and that the excuses given for the price cuts were merely cloaks and disguises. He advised Burnham to take the matter up with the Federal Trade Commission.

In the following month, December, 1928, Burnham called on [240] Emlaw, one of the officers of American Potash, and accused American Potash of infringing the Burnham patents for the extraction of borax from lake brine. When Burnham made this accusation, Emlaw was angry and defiant and denied the charge. But Burnham did not believe him and made preparations to sue American Potash

for infringement of the patent. When Emlaw denied the charge, Burnham called on C. B. Zabriskie, one of the officers of Pacific Coast Borax, and asked that Pacific Coast Borax finance the proposed suit of Burnham against American Potash for patent infringement, in order that borax prices might be increased. After some discussion Zabriskie stated that he was impressed with the suggestion, but a little later he refused the proposal and this refusal increased the suspicions of Burnham.

In the spring of 1929 Burnham and Townsend went to Washington and New York. Before returning west, Burnham called on Zabriskie and Emlaw in New York on May 17, 1929. This date, May 17, 1929, is the commencement date in the question which is submitted to you by the Court.

Mr. Carr has told you what the testimony of his client will be as to what passed between Burnham and Zabriskie in the conversation of May 17, 1929. Zabriskie died a few years after this conversation took place, so that it is impossible to obtain his testimony about the conversation.

We shall show, however, with respect to that conversation, [25] on the basis of notes which Mr. Burnham himself made that the first thing which Burnham noticed when he entered Zabriskie's room was a picture of Stephen T. Mather on the wall of Zabriskie's office; that this immediately revived the suspicions which had been aroused when he learned of the Mather letter, and that he discussed with Zabriskie the connection between Pacific Coast Borax and Sterling Borax, of which Mather was



president. He did not, however, say a word about the Post Office fraud order, as to which he had charged, in his sworn amended complaint, three years before, that the order was brought about by the action of these defendants, including Zabriskie's own company, in violation of the Antitrust Law.

We expect that Burnham will testify that at this interview he accused Zabriskie of cutting the prices with American Potash to injure plaintiff, but that Zabriskie denied the accusation and told him that there was no connection between the price cut of Pacific Coast Borax and the price cut of American Potash. But we expect to show that so little did Burnham believe any such statement that on leaving Zabriskie's office, after stopping only for lunch, Burnham went straight away to Emlaw and accused him of conniving with Pacific Coast Borax in bringing about the price cut in order to damage the Burnham Company.

After these interviews, Burnham started west, but on May 29, 1929, he met Whitney in Chicago for the purpose of [26] interviewing Mather to find further facts in support of the charge that Mather had brought about the Post Office fraud order in order to injure the plaintiff and benefit the defendants.

In the following month, June of 1929, at a hearing before the Land Office in Los Angeles, Burnham, under oath, accused the American Potash of using his process to produce borax cheaply and drive the Burnham Company out of business.

By the fall of 1929, all of the Burnham borax was sold; it had permanently ceased production in Janu-

ary of that year. As soon as the Burnham borax had been sold, the defendants suddenly and simultaneously increased the price 30 per cent.

In the latter part of 1929 Burnham was endeavoring to press on for hearing his application for an injunction against the Postmaster at Reno. This application finally came on for hearing before the United States District Court at Carson City in January, 1930. On January 14, 1930, the plaintiff filed an affidavit in support of his motion for a temporary injunction. We shall offer this affidavit in evidence, because it shows Burnham's knowledge seven months after May of 1929 of the activities of the defendants and his conclusion that they were violating the Antitrust Laws. In this affidavit he reaffirmed under oath the truth of all his charges made in his amended complaint of 1926, and he set forth the price cuts of 1928, and the injury done to the plaintiff as the result of [27] those price cuts.

This affidavit was used upon the hearing before the Court, and as a result of that hearing, the Court temporarily enjoined the Postmaster from enforcing the fraud order so that the situation might be preserved until a final trial of the case.

In the years which followed 1930, Mr. Burnham was confirmed from time to time in his belief that these defendants had violated the Antitrust Laws. About the time when his borax business at Searles Lake was being destroyed by the drop in price, the Burnham Company had applied for a prospecting permit on the Little Placer borax property situated in the Kramer district. The Burnham Company



and the United States Borax Company, which was affiliated with Pacific Borax, were contesting the right to mine on Little Placer. On May 19, 1933, Burnham's application for a lease on the Little Placer was denied by the Land Office, which held that the mineral location of the United States Company was superior. We shall prove, by an affidavit sworn to by Mr. Burnham, that on this occasion his suspicions were again aroused and that he then believed that defendants, or some of them, were probably violating the Antitrust Laws.

His belief that the defendants were violating the Antitrust Laws was revived and confirmed in 1934. In that year he learned that Pacific Coast Borax had acquired the properties [28] of Western Borax Company in the Kramer district, and had secured a lease from the only active producer of borax in that district, the Suckow Mining Company. He realized that the Pacific Coast Borax Company was about to secure a patent on the Little Placer claim, and that if they did, they would have a one hundred per cent monopoly on the Kramer borax field, which he claimed would be in violation of the Antitrust Laws. He had heard that Mr. Neblett, the partner of Senator McAdoo, acting as counsel for a Senate Investigating Committee, had made a charge of monopolization in violation of the Antitrust Law against the Pacific Coast Borax Company. In this situation he had a conference with his attorney, Mr. Townsend, on July 30, 1934. Townsend suggested that he go east and get in touch with public officials in connection with the monopoly. He advised him



to take with him all documents that might be useful, including the amended complaint, the affidavit of January, 1930, and the Mather letter. All this aroused Burnham's suspicions and belief that the defendants were violating the Antitrust Laws.

Immediately after this discussion with Townsend, Burnham started east, carrying with him these documents and also a letter of introduction from Heney to Mr. Louis Glavis, who was head of the Bureau of Investigation of the Department of the Interior. The letter said that Burnham intended to talk to Glavis about the matter of the Pacific Coast Borax Company [29] having established an evil and strangling monopoly in the borax business, which was, of course, a violation of the Antitrust Laws. Burnham interviewed Glavis; told him of his grievances; told him that the very month his company started production their two competitors had cut the price; told him that after his borax was sold, the competitors again raised the price. These facts he told him because he believed these facts to be significant as bearing on the violation of the Antitrust Laws by the defendants.

Later in the same month, on September 21, 1934, Burnham addressed a letter to the Secretary of the Interior, in which he again made complaint of the damage done as the result of the price cut in 1926 and protested against the growing monopoly in the borax business.

Two years later, in 1936, the Senate adopted a resolution for an investigation of the potash industry, and Senator Pittman, a member of the In-

investigating Committee, wrote the Burnham Chemical Company, asking for information. Burnham replied on October 10, 1936, describing the defendants as the British Borax Trust, telling of the damage done by the Post Office fraud order, which he said was probably influenced by his competitors, that is to say, American Potash and Pacific Coast Borax. He again called attention to the damage done by the cut in the borax price in the very month the Burnham production was started. [30]

I have said that in 1930 the District Court of Nevada granted a temporary injunction against the enforcement of the Post Office fraud order. The suit, however, was not prosecuted by the Burnham Company, and was dismissed for lack of prosecution in 1935. In September, 1937, the Post Office began again to enforce the order and stopped the mail coming to the Burnham Company. This aroused the suspicions of Burnham and his belief that the defendants, American Potash and Pacific Coast Borax, whom he described as the Borax Trust, were responsible for the injury.

In May, 1938, he consulted a new attorney, Mr. William Stephens, of New York, and unburdened his troubles to him, including the price cuts of 1928. We shall show that when Burnham stated his case to Mr. Stephens, Mr. Stephens was impressed with the simultaneous cuts in price and said that that might indicate a violation of law, but he expressed a doubt whether he had a chance with the Federal Trade Commission, because the claim based on the price cuts had been outlawed.

In August, 1939, Burnham decided to go to Washington to attend a hearing involving the rights of the defendant, United States Borax Company, to a patent on the Little Placer. He left the west coast in early September and took with him the Mather letter of 1926, and a copy of the Hinrichs' letter of 1928, because he thought they were important documents of which he could make good use. He also intended to consult Mr. [31] Stephens in New York on this trip.

In November of 1939 he called on Mr. Wendell Berge of the Antitrust Division of the Department of Justice and described his claims that the defendants had violated the Antitrust Laws.

What he told Mr. Berge on that occasion was repeated in a letter which he wrote on November 22, 1939, to Mr. Thurman W. Arnold, Assistant Attorney-General in Charge of Antitrust Prosecutions. This letter is most important, because it states with clarity Burnham's belief that these defendants had violated the Antitrust Law and thereby damaged the plaintiff. The facts about the price cuts are restated. In this letter Burnham says that "the fact that the price cutting started the month we began production convinces us that it was aimed purposely to destroy us". Burnham then goes on to say that in 1928 he consulted Heney and Townsend, who advised him that he had a case under the Antitrust Laws. The 1928 letter from Townsend to Hinrichs in July, 1928, was enclosed with the letter; and in the letter itself, Burnham says that the only reason he had not prosecuted was



because of lack of funds. All the facts stated in this letter had been known to Burnham for ten years before. The same complaints were made in a letter addressed to the Secretary of the Interior on November 18, 1939.

On the basis of all these facts, including the repeated [32] statements of Burnham, made in the letters which he signed and documents to which he solemnly swore, we shall ask you to reply to the question of the Court that the plaintiff did, between May 17, 1929, and October 10, 1939, have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Antitrust Laws of the United States.

The Court: The reporter needs a little rest. He has been taking down a lot of long statements for some time.

Ladies and gentlemen of the Jury, at this time we will take a short recess. I will ask you to bear in mind that at all times when you are absent from the courtroom it is your duty not to talk about this case among yourselves, nor let anybody else talk to you about it or any subject connected with it; nor are you to form or express any opinion on the case until it is finally submitted to you.

(Recess.) [33]

Mr. Carr: May I at this time offer a proposed instruction?

The Court: Very well. Did you want to make a statement, Mr. Aitken?

Mr. Aitken: If it please the Court, ladies and gentlemen of the jury, Mr. Beardsley and I represent the defendant American Potash & Chemical Company, the other defendant, as distinguished from the group represented by Mr. Harrison. In a matter of this kind, where it is very apparent that the case will be somewhat lengthy and take a great deal of the jurors' time, we attorneys on the defendants' side of the table, where we are representing individual and separate defendants, feel it is desirable and helpful not only to the court, but to the jurors, to as much as possible avoid repetition, and for that reason we have agreed and will continue to, as far as possible, permit Mr. Harrison to make the opening statement and conduct the examination of the witnesses. If there are matters that occur from time to time that we as counsel for the defendant American Potash feel necessary to say something about, we will do so, but for the most part, while we are independent parties, yet we are charged jointly in this matter and feel, therefore, it would be much to your advantage and to the court's advantage to make the matter conducted by one counsel. I give that explanation and point out to you why we will not take a more active part individually in the defense of our client. [34]

In connection with the facts which Mr. Harrison so clearly recited to you in his opening statement, I do not want to have the jury get the impression that so far as my client is concerned, we thereby are admitting that those facts constitute a violation of the Antitrust Laws, though we do feel, and we want

to leave with his jury the thought unquestionably they are fact, and being as they were well known to the plaintiff in this case, gave him good cause to believe that there had been a violation of the Antitrust Laws to the injury of the plaintiff corporation, and that is the issue before you, and that is the purpose for calling these facts to your attention, to show that there was the existence of facts which gave the plaintiff good cause to believe, during the period that is defined in the order, that he had been injured by the acts of the defendants in violation of the Antitrust Laws.

Mr. Carr: May I make one very brief reply, if it please your Honor? Mr. Harrison stated to you what they did do, and he recited very fully what happened us, and they knowingly did to us, but we will show that at the time they were doing these things to us they were lulling Mr. Burnham into the belief that they were not doing them through any violation of the Antitrust Laws. The evidence will show that he talked with the officers. He asked them about the various acts, and the officers advised him that it was purely incidental, that the things they were doing were not intended to [35] destroy or injure Mr. Burnham's company in any respect. In other words, they lulled him into a sense of security and belief that there was no violation of the Antitrust Act.

As these things occur from time to time, the evidence will show that Mr. Burnham presented them to various officers of the Government in Washington and in San Francisco, asking their advice as



to whether or not these things did constitute violations of the Antitrust Act, and in all of those instances he was advised that they were not, and that he had no cause of action against these defendants under the Antitrust Act. The evidence will show no doubt Mr. Burnham knew all that was happening to him as stated by Mr. Harrison, but he did not know, until the Government filed its actions here in the fall of 1944, that all of these acts done and performed as stated by Mr. Harrison by these defendants were done pursuant to an unlawful agreement and combination and conspiracy to control the prices and monopolize the industry, and we will show that it was not until that came to Mr. Burnham's attention that we were in a position to have commenced this action.

We will also show up to that time the Government, or shortly prior thereto the Government did not know that these people had actually violated the Antitrust Law, and we will also show it was not until after this last war that the Government went into the books, got into the books of the American Potash & Chemical Company and found that that was a German-owned [36] corporation instead of a British-owned corporation, as it had been previously thought to be, that the Government, itself, with all of its powers, were able to ascertain the true facts of this conspiracy which we allege in our complaint.

Mr. Burnham, will you be good enough to take the stand, please? Were you going to say something?

Mr. Harrison: Well——

The Court: He was going to object to something you said but he changed his mind.

Mr. Carr: I will stipulate you may have all the objections you want.

Mr. Harrison: To save time we will go ahead with the evidence.

Mr. Carr: I will call Mr. Burnham. Mr. Burnham, you had better take with you your various records and documents that you have.

The Witness: Shall I bring the other suitcase, too?

Mr. Carr: Oh, no. We won't get that far before noon.

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### GEORGE B. BURNHAM

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Q. State your name to the court and jury. A. George B. Burnham.

### Direct Examination

By Mr. Carr:

Q. Where do you reside, Mr. Burnham? [37]

A. In Oakland, California.

Q. What is your business?

A. President and director of the Burnham Chemical Company.

Q. The plaintiff herein?

A. The plaintiff, yes.

Q. How long have you been such?

A. Since 1921. There were one or two years when I was not *present*, but practically all the time since 1921.

(Testimony of George B. Burnham.)

Q. The Burnham Chemical Company was incorporated when? A. In 1921.

Q. Under the laws of the State of Nevada is that correct? A. That is right.

Q. What was the business of the Burnham Chemical Company?

A. The business of producing borax and other chemicals from the saline brine of Searles Lake, in San Bernardino County, California.

Q. Mr. Burnham, you are an American citizen?

A. Yes.

Q. Where were you educated?

A. University of California.

Q. Did you hold any position there upon your graduation?

A. For a while I was assistant instructor in the Department of Physics.

Q. You left the University to take up this borax operation, is that correct? [38] A. Yes.

Q. You had, I believe, prior to your resignation from the university, done certain work along this borax line, had you?

A. Yes, I did a great deal of research work in developing processes for recovering potash, borax, and other chemicals from the alkaline lakes of the California and Nevada deserts.

Q. And it was in this connection that you organized the Burnham Chemical Company; in fact, you went to work in the Searles Lake field prior to the incorporation of the company, did you not?

A. Yes, I did. I went to work at Searles Lake in 1918.



(Testimony of George B. Burnham.)

Q. How many stockholders are there of the Burnham Chemical Company?

A. There are about 7000 stockholders in the Burnham Chemical Company.

Q. Mr. Burnham, did you know on May 17, 1929 or at any time between May 17, 1929 and October 10, 1939, inclusive, that the business of the Burnham Chemical Company, the plaintiff herein, had been damaged by the acts of the defendants, or some of them, in violation of the Antitrust Laws?

A. No.

Mr. Harrison: I object to that on the ground it calls for the conclusion of the witness, if the Court please, is leading, and is the precise issue to be passed upon by the jury.

Mr. Carr: It is asking him about a fact, whether he knew.

The Court: I will overrule the objection. You can cross-examine [39] him on that.

Q. (By Mr. Carr): What is your answer, Mr. Burnham? A. The answer is "No."

Q. Did you do anything from May 17, 1929 to October 10, 1939, inclusive, to ascertain whether or not the defendants herein, or some of them, had violated the Antitrust Laws? A. Yes, I did.

Q. What did you do?

A. I did a great many things.

Q. Will you state, commencing with May 17, 1929, what investigations you made, if any, as to the activities of these defendants as alleged in the complaint? A. On May 17th—

(Testimony of George B. Burnham.)

Q. You have in your pocket, have you not, a memo of the various dates on which you did certain things, is that correct?      A. Yes, I have.

Mr. Harrison: If the Court please, we object to a question of investigations. The question here is as to knowledge, what he knew or what he had cause to believe. The issue is not one of diligence; the issue is one of his knowledge.

Mr. Carr: It is diligence. We will show just what he did during all of this period of time. We have asked him and he has answered that he made certain investigations as to the activities of these defendants.

The Court: I shall overrule the objection. I think it is [40] a matter that you can cover by such examination as you wish to make of the witness. It is very difficult to rule in advance as to the materiality of a question of this kind. It depends upon what the man did do. I think it can be better reached latter on.

Mr. Carr: May it please your Honor, Mr. Burnham has a brief chronological order of his activities, and may he in testifying refer to that? It is just for the purpose of refreshing his memory.

Mr. Harrison: Was it made at the time of the event?

Mr. Carr: No.

Mr. Harrison: We object to it, if the Court please.

Mr. Carr: It is simply recalling to his mind. He cannot remember the specific dates. It just

(Testimony of George B. Burnham.)

recalls to his mind the dates when he did certain things. There was a long list of activities on his part as to what he did at this time. It is just merely for the purpose of refreshing his memory, notes he has made from his own records.

Mr. Harrison: We object to that unless the original records made at the time are produced, if the Court please. The witness cannot testify to something he has written up for the purpose of testifying.

Mr. Carr: This is not a memo. of his testimony. It is simply the dates and the headings.

The Court: I do not think, Mr. Carr, that that would be [41] proper. The witness has to testify on the witness stand of matters of his own knowledge. If he has some memo. made at the time for the purpose of refreshing his memory, you can use that, but, as counsel has said, the witness cannot write out his testimony in advance.

Mr. Carr: It is not writing out his testimony, your Honor; it is just a statement of dates put in chronological order.

Mr. Harrison: That is part of the testimony.

Mr. Carr: I can ask him the questions from the counsel table and arrive at the same thing.

The Court: That is all right, but I do not think it would be proper for a witness to have a document in front of him that he, himself, prepared at some other time.

Mr. Carr: It is not his testimony. It is just the dates. I will ask him then, your Honor, from



(Testimony of George B. Burnham.)

the counsel table. It is just to refresh his own memory on the witness stand.

Q. Mr. Burnham, on May 17, 1929, did you see Mr. C. B. Zabriskie, the vice-president and general manager of Pacific Coast Borax Company?

Mr. Harrison: That is objected to on the ground it is leading, if the Court please.

The Court: I will overrule the objection.

A. Yes, I did.

Q. (By Mr. Carr): Where did you see him?

A. In New York, at the office of his corporation, the Pacific Coast Borax Company. [42]

Q. Did you have a conversation with him at that time? A. Yes.

Q. Was anybody present besides yourselves?

A. No.

Q. You and Mr. Zabriskie?

A. Just Mr. Zabriskie and myself alone.

Q. Had you know Mr. Zabriskie previous to this time?

A. Yes, for many years.

Q. What was the conversation you had with Mr. Zabriskie at that time?

A. I told Mr. Zabriskie that it looked to me like his company and the American Potash & Chemical Corporation had cut the prices on borax deliberately to drive us out of business, and Mr. Zabriskie said no, they didn't do that. They weren't trying to injure us; that the price of borax had fallen due to the over-production of borax; furthermore, they had a cheaper process, a cheaper

(Testimony of George B. Burnham.)

source of borax in the Kramer Borax District, and that was another reason why the price of borax went down.

I asked him if Mr. Mather, of the Stirling Borax Company had any stock in the Pacific Borax Company, and he said no.

I said, "Well, I understand that Stirling Borax Company is a subsidiary of your company."

He said, "Yes."

And I said, "Well, don't they sell their borax at prices that you determine they should sell it for?"

He said, "No, the Stirling Borax sell their borax at any [43] price that they wish to."

I said, "Well, it seems to me this drastic cut in the price of borax just the month we start production is a matter that we should take up before the Federal Trade Commission to see if any anti-trust laws are being violated."

And he said, "It wouldn't do any good, because there is no violation of any law. The price of borax has gone down due to an over-production, and due to the fact that we have a better source of borax." And he went at great length to explain to me why the price had fallen. And after a long talk with Mr. Zabriskie I concluded that he was right. He was very convincing in his argument.

Mr. Harrison: I think that last statement was not responsive and did not relate to the conversation.

(Testimony of George B. Burnham.)

Mr. Carr: It is what he believed, your Honor.

The Court: He was asked to state the conversation, and the last statement of the witness commencing with the words "after a long talk" may go out.

Mr. Harrison: In order that the record may be preserved, if the Court please, we desire to object and move to strike out the answer of the witness on the ground that the plaintiff has no right to rely upon any denial of the charge made by the defendants or anyone in their behalf.

Mr. Carr: He is an officer.

The Court: I will overrule that objection. It goes to the [44] weight of the evidence.

Q. (By Mr. Carr): Did you believe what Mr. Zabriskie told you at that time?

A. Yes, I did.

Q. And you continued in such belief for how long?

A. Until September, 1944, when the Department of Justice brought its indictment against my competitors.

Mr. Harrison: I move to strike out any reference beyond the date, if the Court please.

Mr. Carr: Are you going to stick to that?

Mr. Harrison: Yes, indeed.

Mr. Carr: Remember, if you are going to stick to that you can't bring anything in about the fraud order.

Mr. Harrison: Oh, no.

Mr. Carr: If you are going to stick to that.



(Testimony of George B. Burnham.)

The Court: If you are going to get into these arguments, I am pretty easy about conducting the court, but I am going to insist that counsel address the court. Otherwise we waste too much time in side issues.

Mr. Carr: Yes, your Honor.

Mr. Harrison: I move to strike that out.

The Court: I will deny the motion.

(The last question and answer were read by the reporter.)

Q. (By Mr. Carr): Mr. Burnham, on May 17, 1929, did you or did you not call on Mr. H. S. Emlaw? [45]

A. Yes, I called on him also.

Q. That same day?

A. That same day. He was president of the American Potash & Chemical Corporation, our other competitor.

Q. Where was his office?

A. In New York City.

Q. Had you known Mr. Emlaw previous to that time? A. Only just briefly.

Q. Did you have a conversation with him at that time? A. Yes, I did.

Q. And this was all in his office? A. Yes.

Q. Was anyone else present besides yourself and Mr. Emlaw?

A. Somebody came in and went out, but I don't remember who it was.

Q. What was that conversation, Mr. Burnham?

(Testimony of George B. Burnham.)

A. I told Mr. Emlaw that I believe price-cutting was aimed at the Burnham Chemical Company, to destroy our business, and Mr. Emlaw said, "That is not so," that there is an over-production of borax—in fact, their warehouse was full of borax and they could not sell it, but they would be glad to sell it to anybody if they could just get an offer, and it was the over-production of borax that caused the price to go down so drastically.

He also explained to me, and of course I already knew, [46] that for every three or four tons of borax that they made they also made about two tons—excuse me—for every three of four tons that they made they also made two tons of borax. There was quite a demand for potash, and therefore they were making lots of potash, with the result that a great deal of borax was also being made and accumulating in their warehouse.

Q. Mr. Burnham, did you make any record of these conversations?      A. Yes.

Q. What in?      A. In my notebook.

Q. Your personal notebook?      A. Yes.

Q. When did you make these records?

A. Shortly after the conversation with Mr. Zabriskie and with Mr. Emlaw.

Q. Have you that notebook with you?

A. Yes, I have.

Q. Will you please open it to the place and read to the jury what you have therein?

A. I write these notes in the evening after my day's work is done, or sometimes I write them on trains or on subways.

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): The question is to read, please, Mr. Burnham.

The Witness: Excuse me. I have here a memorandum dated May 17, 1929: "Had a discussion with C. Zabriskie. Says [47] Steve Mather not a stockholder in P.C.B. They are competitors. Have picture of Mather on wall. They sell borax at any price they wish. P.C.B. sells crude borax to them. Doesn't believe Federal Trade Commission could do anything. Trona have to sell. It can't help it."

Q. (By Mr. Carr): Trona was the American Potash?

A. That is right. The American Potash & Chemical Corporation's plant is located at Trona, California.

Another memorandum says: "Zabriskie believes du Pont did not buy interest. London Times Financial Section, Amalgamated Mines Trust, South Africa, May 3rd, which is a subsidiary in question."

That is practically all of the memorandum.

Q. What is that?

A. That is the substance of the memorandum of my visit with Mr. Zabriskie.

Q. Not the substance; is it the memorandum, the full memorandum? A. The notes, yes.

Q. Did you have a similar memorandum of your conversation with Mr. Emlaw? A. Yes.

Q. Is that entered in your book?

A. It is also entered here in the book.

Q. Was the entry made about the same time?

A. It is also dated May 17, 1929. [48]



(Testimony of George B. Burnham.)

Q. Was that entry made shortly after your conversation with Mr. Emlaw? A. Yes.

Q. I should have asked you that question about Mr. Zabriskie. Was it made shortly after your conversation with Mr. Zabriskie?

A. Yes. I called on Mr. Zabriskie in the morning and Mr. Emlaw in the afternoon.

Q. Will you be good enough, Mr. Burnham, to read what your entry is with respect to Mr. Emlaw?

A. It states: "May 17, 1939. Called on Emlaw, of the American Potash & Chemical Corporation regarding the concentration—regarding the selling of concentrated brine. Says brine must have enough sodium carbonate to make—" and this formula I will read—

Mr. Harrison: "Must be enough"?

The Witness: I will read just as it says: "Says brine must have enough  $\text{Na}_2 \text{CO}_3$  to make 3  $\text{Na}_2 \text{CO}_4$ , 2  $\text{Na}_2 \text{CO}_3$ . Refer matter to Burke. Didn't discuss patents. Emlaw says not selling. Nothing in it."

Q. (By Mr. Carr): Not what?

A. "Nothing in it."

Q. (By Mr. Harrison): Is that on the same page?

A. That is on two pages before, but it concerns that same conversation. I will repeat that. I have the same words here: "American Potash & Chemical Corporation, 233 Broadway, Whitehall, [49] 7240, P. C. B., Beekman 0332," and then I have an arrow going from the American Potash & Chem-

(Testimony of George B. Burnham.)

ical Corporation down to this sentence: "Emlaw says not selling. Nothing in it. Would sell if he could get an offer."

The Court: We will take the noon recess at this time, gentlemen. Ladies and gentlemen, we will recess at this time and reconvene at 2:00 o'clock. Please return at that time, and bear in mind the admonition that I gave you earlier this morning.

(A recess was taken until two o'clock p.m.)

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Afternoon Session, March 27, 1947

2:00 P.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Carr: Shall we proceed, your Honor?

The Court: Yes.

GEORGE B. BURNHAM

recalled;

Direct Examination

(Resumed.)

By Mr. Carr:

Q. Mr. Burnham, just before conclusion of the court you testified that you believed Mr. Zabriskie's statement to you. When did you come to that conclusion? What period of time, I mean?

A. Well, after my talk with Mr. Zabriskie I was very much convinced that what he said was true, but as long as I was in New York I decided to go over——

(Testimony of George B. Burnham.)

The Court: The question was: When did you come to that conclusion?

A. Oh, right after my talk with Mr. Zabriskie, that is, I was very much convinced that what he said was true.

Q. (By Mr. Carr): Then when did you finally become definitely convinced in your own mind that his statements to you were true?

A. After my talk with Mr. Emlaw which confirmed Mr. Zabriskie's statement.

Q. Then am I right in saying when you wrote down those notes [51] in your book you had come to the firm belief that the statements of both of those gentlemen were true? A. Yes.

Mr. Harrison: I object to that as highly leading. The subject matter has been covered.

The Witness: Yes.

The Court: Read the question.

(Question read.)

The Court: I will allow it.

Q. (By Mr. Carr): Will you refer again to your conversation with Mr. Emlaw in your notebook, please?

Mr. Harrison: By the way, Mr. Carr, may that be marked by the clerk for identification?

Mr. Carr: Yes, but we would not like it to go out of our possession.

The Court: Mr. Harrison wants it identified so it may be identified in the record.

Mr. Carr: Let me ask a few questions about this book.



(Testimony of George B. Burnham.)

Q. Mr. Burnham, are those your personal records, or are they the records of the Burnham Chemical Company?

A. They are my personal records.

Q. How long have you kept such books, if you have kept them over a period of time?

A. Since 1923.

Q. What are they? What do they consist of, those little black [52] books, as we call them?

A. They are little memorandums that I want to jot down and remember. Originally they started out as merely notes, but as time went on there was a lot of diary information that was put into them.

Q. It is your own personal record, is that correct?

A. That is right, my own personal records.

Mr. Carr: We have no objection that they be marked.

The Court: Let the book be marked Plaintiff's 1 For Identification.

The Witness: It has been marked there already.

Mr. Carr: It has been marked for the deposition already.

The Court: Put a sticker on it.

Q. (By Mr. Harrison): What year?

A. 1929.

Q. That is a book which is marked on the outside "29"?      A. "29," yes.

(The document in question was thereupon marked Plaintiff's Exhibit 1 For Identification.)

(Testimony of George B. Burnham.)

Q. (By Mr. Carr): If you refer, please, Mr. Burnham, to that note in reference to a conversation with Mr. Emlaw to which you testified this morning——

A. Shall I read it all over again?

Mr. Harrison: What is that?

The Court: He has not asked you a question.

Q. (By Mr. Carr): No, refer to that. Open it up. What did Mr. Emlaw say about not selling?

Mr. Harrison: What are you asking for now? The entry?

Mr. Carr: Yes, what the entry says.

The Witness: The words about not selling read this way: "Emlaw not selling."—"Emlaw says not selling. Nothing in it."

Q. (By Mr. Carr): What does that refer to?

Q. (By Mr. Harrison): Is that all the entry on that point?

A. No, there is another sentence: "Would sell if could get an offer."

Q. (By Mr. Carr): To what did that refer?

Mr. Harrison: If your Honor please, if counsel's question is directed to the conversation we have no objection, but we submit the witness should not be asked to interpret his memorandum.

Mr. Carr: The only way we can do it is from the witness.

Mr. Harrison: I object to the question unless it is clarified as directed to the conversation.

Mr. Carr: It is.

(Testimony of George B. Burnham.)

Q. Does that refer to the conversation you had with Mr. Emlaw, or any part of it?

A. Yes, it does.

Q. What does it refer to? What part of the conversation, and what is the conversation to which that memo. refers? [54]

A. It is concerning the sale of borax.

Q. What was the conversation on that point, Mr. Burnham?

A. Mr. Emlaw was explaining to me that their warehouse was full of borax and they could not sell any, and it wasn't selling, that there wasn't any money in it, anyway, but nevertheless he would sell the borax if he could get an offer.

Q. Mr. Burnham, on or about May 25, 1929, did you or did you not call on Mr. Seth Richardson, an Assistant Attorney General of the United States?

Mr. Harrison: Is the question directed to his knowledge?

Mr. Carr: Yes.

Q. Did you or did you not?

A. Yes, I did.

Q. Where did you call on him?

A. In Washington, D. C.

Q. Was he a Government official? A. Yes.

Q. What was his position?

A. Assistant Attorney General.

Q. You called at the Department of Justice to see him, did you? A. Yes.

Q. Did you have a conversation with him at that time? A. Yes, I did.



(Testimony of George B. Burnham.)

Q. Who was present at that conversation?

A. Mr. Ridley. [55]

Q. Who is Mr. Ridley?

A. He was somebody connected with the Department of Justice.

Q. What was that conversation that you had with Mr. Richardson?

Mr. Harrison: That is objected to, if the Court please, on the ground it is incompetent, irrelevant, and immaterial, and calls for hearsay testimony. In other words, if the witness is to be allowed to repeat every conversation he had with anybody during this whole period of ten years, we submit it will be wholly immaterial and might be highly prejudicial. The fact that somebody else said to him this, that, or the other thing certainly is not sufficient to prove that he did not know, negative form, and we submit the witness has been asked whether he knew, and he has stated, but that it is wholly incompetent to have him show what somebody told him. Certainly the defendants are not bound. The defendants are charged with having made certain statements here, and they cannot be bound by what some third person said.

Mr. Carr: The defendants are not charged with having made any statements here, your Honor. This examination is going to the good faith. The witness has already testified that he did endeavor to ascertain whether or not these people were violating the Anti-trust Laws. Then I asked him what did he do in that respect. Obviously, this is the only way in

(Testimony of George B. Burnham.)

which it can be reached, and this is a conversation with a Government official. [56]

The Court: I do not understand how you can avoid the hearsay rule.

Mr. Carr: It is not hearsay.

The Court: Suppose he went down and talked to the newsboy; how can that be admissible?

Mr. Carr: That would not be an officer of the Government who would be empowered to go after these fellows for Anti-trust violations. The question is whether or not he used reasonable efforts to ascertain whether or not these people were violating the Anti-trust Laws.

The Court: I do not see the materiality of that, Mr. Carr. The only question is whether the plaintiff knew or had good cause to believe that he had a cause of action.

Mr. Carr: Exactly. Under your Honor's ruling the test is good cause to believe, and what greater investigation could he make than to go to the people of the Government who were charged with the enforcement of the Anti-trust Law? It is all in substantiation of his statement that he did not know or did not believe that these people were violating the Anti-trust Laws until the Government action at or in 1944. Now, this goes to the very question of his belief. Without that, it shows what his activities were. I agree with your Honor that the burden is upon the plaintiff that he show reasonable diligence to discover whether or not these violations——

(Testimony of George B. Burnham.)

The Court: I do not think the plaintiff has any such burden [57] as that. He has already testified that he neither knew or believed he had any cause of action against the defendants until 1944. That is his own testimony. That is, shall we say, a *prima facie* showing.

Mr. Carr: But we have to also show under your Honor's ruling that we used reasonable diligence in the face of the fact that the statute apparently has run.

Mr. Harrison: I do not understand your Honor has ever so ruled or that any question of due diligence was ever imported into this case for the purpose of this specific issue. Now, this specific issue is, Did this man know at any time during the period of ten years or did he have cause to believe that certain things occurred, and testimony of his as to whether or not he knew certain things had happened would be admissible. If he knew, then the answer should be "Yes," and if he did not know, the answer should be "No," and that is true whether he used diligence or not. The question is his knowledge and his belief. Under the guise of attempting to prove a wholly immaterial issue about diligence, counsel is now seeking to import into the case evidence of conversations at which opinions may have been expressed by people, and it does not make in point of law a particle of difference whether the person who spoke, if he did speak, was a subordinate official of the Government, or an utter stranger. Under such a rule he could prove any



(Testimony of George B. Burnham.)

conversation tending to indicate one opinion, [58] just as any conversation would be omitted, I assume, which tended to indicate another. We submit it is utterly immaterial. It does not bear on the real issue before the jury. It is prejudicial and hearsay.

Mr. Carr: Have you finished?

Mr. Harrison: Yes.

Mr. Carr: The question and the law is, as your Honor well knows, in cases of this kind where the statute has run on the face of the situation, and where fraud is charged, as it is here, and the matter concealed, as it is charged here, we have to show that inasmuch as the statute has run, why, we did not discover this fraud or our cause of action within the three-year period, and to do that we have to show that we exercised due diligence in doing that.

The last case on the situation that we find is Hansen vs. The Bear Film Company, reported in——

Mr. Harrison: If your Honor please, may I suggest if the argument is going to be lengthy that we may pursue that without bothering the jury with it?

The Court: Let me hear what Mr. Carr has to say.

Mr. Carr: I said that the last decision is Hansen vs. The Bear Film Company, a decision of the Supreme Court decided on May 7th of last year, in which it was said, "Where a defendant is guilty of fraudulent concealment of a cause of action, the

(Testimony of George B. Burnham.)

statute of limitations is deemed not to become operative [59] until the aggrieved party discovers the existence of the cause of action.”

The Court: I understand the point that both of you have made, but I do not see what any affirmative acts on the part of the aggrieved party have to do with it. He does not have to do anything if he has not discovered it.

Mr. Carr: If we have any suspicions, if a party has any suspicions or thoughts on the subject, he cannot sit down and remain inactive in a situation of this kind.

The Court: But the witness has already testified, Mr. Carr, that he did not know he had a cause of action until 1944. What has diligence got to do with it? I do not know of any holding of any court to that effect. If he does not know it, he doesn't know it, and that is the end of that, and he has a right to bring his action at a later time.

Mr. Carr: He cannot sit by, your Honor, if he has any idea of the possibility of the situation. He can't sit by and do nothing. He must exert himself to ascertain whether or not his suspicion is worthy of fruit, whether it bears fruit or whether it is founded in fact. In the Pashley case, which your Honor has read, it goes into that very fully.

The Court: It may be by way of rebuttal, if the defense presents some evidence, it might then be proper. I do not know. I am just guessing at that. It might be proper for you to answer that by saying, “Yes, the defendant did know about [60]

(Testimony of George B. Burnham.)

that," or "The plaintiff did know about that, but he investigated it and he found that there was no reason for him to bother about that." But I do not see how you can prove a negative now as part of your affirmative case.

Mr. Carr: Maybe your Honor is correct.

The Court: I am not going to shut you out from presenting anything that is material to the case. This line of examination at this time is purely a negative matter. It is purely hearsay.

Mr. Carr: If that is correct, and we are not to be precluded on redirect or rebuttal, why, of course, I think your Honor is correct. I think, *prima facie*, we have probably proved our case.

The Court: I am not going to rule on that, but you have directed your inquiries to the precise question of knowledge and belief, and that is that. You may have to meet some new matters later on, but I do not see how you can meet them in advance until you know what they are.

Mr. Carr: As long as we are not precluded. We would be very glad to let the matter rest now with a few more questions.

The Court: I will sustain the objection.

Mr. Carr: As long as we are going to have an opportunity to present our activities later on. Maybe we are anticipating, your Honor. We considered that question in the preparation of the trial, but we thought in order to play on the [61] safe side—well, then, may I have an exception?



(Testimony of George B. Burnham.)

The Court: You do not need it. This is a civil case. You have an exception to all rulings.

Q. (By Mr. Carr): Mr. Burnham, on or about May 27th, 1929, did you have a discussion with one Dr. H. W. Morris, in Ann Arbor, Michigan, in reference to the alleged infringement by the American Potash & Chemical Company of your patent?

A. Yes.

Q. Who is Dr. Morris?

A. Dr. Morris is one of the chemical engineers connected with the American Potash & Chemical Corporation.

A. Where was that conversation held?

A. In Ann Arbor, Michigan.

Q. Who was present?

A. Just Dr. Morris and myself.

Q. What was that conversation?

Mr. Harrison: That is objected to on the ground it is incompetent, irrelevant, and immaterial, and hearsay.

Q. (By Mr. Carr): What was Dr. Morris' position, if any, with the American Potash & Chemical Company?

A. He was the chemical engineer for the American Potash & Chemical Corporation.

Mr. Carr: Now, your Honor, we submit it.

The Court: Don't you have to establish his official relationship to the company? [62]

Mr. Carr: He has already testified that this gentleman, Dr. Morris, was the chemical engineer.

(Testimony of George B. Burnham.)

The Court: I do not know whether that would get you out of the hearsay rule. Is that all you can establish as to the relationship? This man may have been just an employee of the company. [62-a]

Q. How do you know Dr. Morris was a chemical engineer for the American Potash Chemical Company?

A. That was a matter of common knowledge at the time. He invented some of the processes that American Potash and Chemical Company was using, some of their patented processes for recovering potash and borax.

Q. Had you ever seen him at the office of the American Potash & Chemical Company?

A. No, I don't exactly remember that I saw him in the office, but he carried on these experiments at Ann Arbor and Trona as well.

The Court: You saw him in his own laboratory at Ann Arbor.

The Witness: A. Yes.

Q. (By Mr. Carr): Where did you see him at Trona?

A. I didn't see him at Trona, but he told me his experience in developing the process.

Q. Did he tell you of anything he did with the American Potash & Chemical Company?

Mr. Harrison: That is hearsay, if the Court please.

The Court: Are you seeking to bind the defendant by this?

Mr. Carr: Certainly, your Honor.

(Testimony of George B. Burnham.)

The Court: I will have to sustain the objection unless there is some further foundation for that.

Mr. Carr: Very well.

Q. I forget whether I asked you this or not: How do you know that Dr. Morris was connected with the American Potash & [63] Chemical Company?

Mr. Harrison: That has already been answered.

Q. (By Mr. Carr): Mr. Burnham?

A. He invented a process that was patented and used by the American Potash, but I assumed he was hired by the American Potash & Chemical Company.

Q. Did you ever see him down in the plant at Trona?

A. I don't recall actually seeing him there.

Q. Now, on or about July 1, 1929, was or was not the plaintiff engaged in a controversy pending before the Land Office at Los Angeles?

A. Yes, there was a controversy being heard in Los Angeles.

Q. And what was that?

A. In regard to whether or not the sodium borate deposits in the Kramer Borax District came under the provisions of the Sodium Leasing Act of February 25, 1920.

Q. Will you state briefly what led up to that situation, just so the jury will be familiar with that?

A. A hearing was held before the United States Land Office.



(Testimony of George B. Burnham.)

Q. Your company had filed a claim for certain lands?

A. Our company had filed a claim for certain lands in the Kramer Borax District, known as the Little Placer, and the United States Borax Company, one of the defendants, claimed the same land under the mining laws. So there was a conflict over their application for the land, so the Land Office ordered [64] a hearing for both sides to present their cases, as they each felt they were entitled to the land. The hearing lasted for a month and during the course of the hearing our attorney, Mr. Townsend——

Mr. Harrison: Now, is that responsive to any question you have asked him?

Mr. Carr: No, it is not. Let me ask him this:

Q. At that time your company was represented by what attorney?      A. Mr. B. D. Townsend.

Q. And was the defendant the American Potash or the United States Borax Company?

A. The United States Borax Company.

Q. What attorney represented the United States Borax Company in those hearings?

A. Mr. William Colby.

Q. He is an attorney of this city since, or do you know?

A. Of Los Angeles, and maybe of this city, too—I don't know.

Q. At that time and on or about July 1, 1929, was there any discussion between Mr. Townsend and Mr. Colby as to the character of the defendant——

(Testimony of George B. Burnham.)

Mr. Harrison: He can answer that yes or no.

Mr. Carr: Yes.

The Witness: Yes, there was a discussion.

Q. (By Mr. Carr): And what was that discussion? [65]

Mr. Harrison: Now, if your Honor please, we object to this discussion on the grounds in the first place, that a statement of an attorney in the course of litigation, while binding on the client for the purpose of the litigation, is not admissible against that client in another matter. In other words, it is not necessarily binding on the client, but beyond that, on the ground that in the complaint in this action a specific statement on May 17, 1929, is charged and that the issue cannot be enlarged by answering at this time the claim that some other statement was made by one of the representatives of the defendants.

May I say, if your Honor please, in making these objections I would like to have an understanding they may be deemed to be made severally by each of the defendants, so Mr. Aitken and the other defendants do not have to announce them.

Mr. Carr: We will so stipulate.

The Court: Very well. I don't see the materiality of this, Mr. Carr. Are you attempting to show that some attorney for one of the defendants, in some litigation before the Land Office made some statement that this plaintiff relied on in connection with whatever claim he might have against him?

(Testimony of George B. Burnham.)

Mr. Carr: Exactly, your Honor. It is the same situation as the Zabriskie matter and how can your Honor rule without hearing them?

Mr. Harrison: Well, that is letting the evidence in [66] beforehand.

The Court: I think I can without answering your question, but I think you have already told me what this testimony is to be, and I don't see how that would be competent in this case.

Mr. Carr: Well, it will be competent to deny any belief or thought that this plaintiff had that these people were monopolists. That is it exactly.

The Court: You mean some statement an attorney representing some other litigant in some other litigation made to the plaintiff?

Mr. Carr: No, it involved one of the overt acts of the conspiracy charged by us in this complaint. It was one of the overt acts. We were trying to secure the patent or a lease, rather, upon the Little Placer, which was a very valuable piece of ground, and the United States Borax Company or the defendants were trying to keep us out of that particular piece of land and this hearing was to ascertain whether or not the application of the United States Borax Company for a patent on this land under the mineral laws was proper or was our application for a lease under the leasing laws the proper procedure to follow.

The Court: This witness is going to testify, isn't he, that the attorney said his client was not guilty of Anti-trust Law violation? [67]



(Testimony of George B. Burnham.)

Mr. Carr: He did not use those words exactly.

The Court: Well, words to that effect; that is the substance of it?

Mr. Carr: Yes.

The Court: I will sustain the objection. I think that is wholly immaterial and not binding on the defendants.

Mr. Carr: Well, if it destroys anything or if it is a denial, a continual denial all through this conspiracy which is a continuing conspiracy from its inception——

Mr. Harrison: Now——

Mr. Carr (Continuing): ——and if we can show that during all of this period of time or within the period your Honor has stated——

The Court: I don't like to interrupt you, Mr. Carr, but many of these matters we have had under discussion at various preliminary hearings in this matter. I don't see the materiality of any denials. If I claim you owe me twenty dollars and you keep on denying you owe me twenty dollars, I still can make the same contention that you owe me the twenty dollars.

We have this issue in this case: You contended in this case that is a fraudulent concealment.

Mr. Carr: Absolutely.

The Court: I don't see the materiality of that contention. I will sustain the objection. [68]

Mr. Carr: If a man is continuing denying something which is afterwards proved to be correct and true, that is concealment and deceit and fraud. We

(Testimony of George B. Burnham.)

have charged these people with entering into a conspiracy to destroy this plaintiff. Now, we charged them with it during the course of these years. They denied it and we have charged them with it and that in the face of the knowledge that we will in the main case show that—in the face of the knowledge that the charges are correct they keep denying that, that certainly shows concealment and fraud.

The Court: You would have to have some authority to convince me that would be the law. I could not conceive that would be true——

Mr. Carr: You mean, your Honor, you could not conceive if you are charged with fraud——

The Court: Mr. Carr, I have tried hundreds of cases, and so have you. You know that applies in every lawsuit. One side always denies what the other side says. That doesn't mean it amounts to fraudulent concealment.

Mr. Carr: It does if they deny something they know to be true.

The Court: I have seen many lawyers make that representation. You would have to present some authority before I would be willing to sustain your contention that the mere denial of the charge amounts to fraudulent concealment. [69]

Mr. Carr: In the Foster and Kleiser case, which was a treble damage suit against the Foster and Kleiser Company, the complaining witness charged that he talked with the manager of the Foster and Kleiser Company and charged him with the various activities for the purpose of putting him out

(Testimony of George B. Burnham.)

of business and the manager there said yes, he did. That was the purpose of their activities.

Now, in this case this is the converse. The Court in that case goes on to say that the statute will not run if there has been fraudulent concealment. That is the law of the State of California and also of this District and this Circuit. In that case they go into a discussion in Subdivision 7 to 11 there of this matter of fraudulent concealment.

The Court: You say that in that case the California Supreme Court held that the denial of a charge might amount to fraudulent concealment?

Mr. Carr: No, it wouldn't be that. I said that is the converse. That is in our Circuit Court of Appeals, 85 Fed. 2d. and cites the Kimble case, a California case, which was the first one, as your Honor recalls, to get away from the old strict, common-law rule and to hold if a defendant denies the activities which in fact are true, that that is fraudulent concealment. In other words, the Kimble case held it was involved, and the Pashley case and this later case of the Bear Film Company, held where the statute of limitations has been [70] tolled——

The Court: Mr. Carr, if I have a claim against you I don't care under what statute it is, or under what principle of law. I know I have a claim against you. The fact that you deny I have the claim against you does not deter me from proceeding against you, and unless there is something of a fraudulent nature by which I am induced to give



(Testimony of George B. Burnham.)

up a right, or there is something concealed from me, the mere fact that you say you don't owe me money does not enable me to go on year after year and wait and maybe fifteen years later you will finally say, "Well, I admit I owe you the money, but will be too late to bring suit."

Mr. Carr: But in your case you knew you had a claim, but here we didn't know we had a claim.

The Court: Then if you didn't know you had a claim, then there is no occasion for presenting any evidence to the effect that the other side denied it.

Mr. Carr: Yes, because the statute of limitations on the base of the situation had run, but here we were continually trying to find out whether we had a claim under the Anti-trust Law, and as your Honor knows, Sections 1 and 2 provide that those who conspire to ruin another person either by monopolizing or by controlling prices gives that third person a cause of action. Now, where we did not know, we could not know we had a claim——

The Court: If you establish by the evidence that you did not know that, then you have made a proper case to go to the Jury on the special issue. But I don't see the materiality of offering in evidence conversations in which some attorney denied in some litigation that the defendants were guilty of any violation of the Anti-trust Laws.

Mr. Carr: It proves their fraudulent concealment which tolls the statute, your Honor.

(Testimony of George B. Burnham.)

The Court: We have been discussing this somewhat at length and I feel that unless there is some positive authority directly on that point, in my opinion that is wholly incompetent, irrelevant and immaterial.

Mr. Carr: The Bear Film Company case, the Pashley case, and the first case, the Kimble case, as I say, broke away from the old rule.

The Court: I know; I have read many of those cases in connection with this hearing, and you are quite right in your statement of the law that fraudulent concealment is a basis for tolling the statute, but that is not the question I am ruling on. The question I am ruling on is the admissibility or inadmissibility of evidence in support of that claim. It seems to me very clear that is incompetent.

Mr. Carr: We understood at the time of the pre-trial conference that the burden was on us to prove that the statute was tolled. Now, how can we do it except by proving fraudulent [72] concealment? How can we prove it except by showing fraudulent concealment?

Mr. Harrison: Are you finished, Mr. Carr?

Mr. Carr: No, I am not. Come in, anyhow.

Mr. Harrison: I don't want to interrupt.

Mr. Carr: We must prove, as I say, on the surface this action would be barred, but we by proving that we did not know nor could we have ascertained by reasonable diligence that we had a cause of action granted us by Sections 1 and 5——

The Court: I think you misunderstand what I say, Mr. Carr. I did not say that you did not have

(Testimony of George B. Burnham.)

a perfect right to prove there was fraudulent concealment. I am merely ruling on this particular piece of evidence you are now offering, which I have ruled is not competent and is not admissible on that question. I am not holding that you have not the right to show affirmatively in your case that if there was fraudulent concealment of this claim to the detriment of the plaintiff that the Jury can decide that question; but you have just offered now a particular piece of evidence which I hold to be incompetent evidence. That is all.

Mr. Carr: May I make an offer of proof, then?

The Court: Well, if you are going to do that, we will have to excuse the Jury.

Mr. Carr: Well, we won't have to do that now.

The Court: You can do that at a recess period, if you [73] wish.

Mr. Carr: Very well. It seems to us, your Honor, any false statement by the defendants or any of their officers, agents, employees, or attorneys, constitutes a fraudulent concealment.

Mr. Harrison: We submit, if the Court please, Counsel ought not to refer in argument to statements as being false when your Honor has ruled against their admissibility.

Mr. Carr: How can you say they are not false?

Mr. Harrison: I do say they are false.

Mr. Carr: You pled guilty to your complaint.

Mr. Harrison: Now, if your Honor please, I object to that statement on the part of Counsel and I assign it as misconduct.



(Testimony of George B. Burnham.)

The Court: Gentlemen, I hope we are not going to get into lengthy arguments about this matter. That is why I made a preliminary statement to the Jury. The Jury is not to pass upon the merits of the case. There is no presumption here that the plaintiff is right or wrong in this case, as I told the Jury. It is simply a very limited issue in this presentation to the Jury and that is all we have to consider here.

I will sustain the objection to that last question.

I want to advise the Jury at this time that I told you this case presented some little difficulties. These arguments and discussions by the Court and counsel are not evidence in [74] the case and I could perhaps excuse the Jury so you would not have to listen to them, but at any rate, they are not matters that concern you. They are merely discussions of law as to the admissibility of evidence and you are only to consider such evidence as actually comes into the case.

Mr. Carr: I think I will go ahead then. Will your Honor pardon me a moment?

The Court: Certainly.

Mr. Carr: I will try, your Honor, to conform to your Honor's ruling. I think I know what you have in mind.

Q. Now, Mr. Burnham, during the years 1930, 1931, and 1932, do you know if there was any action on behalf of the Pacific Borax Company against the American Potash Company? A. Yes.

Mr. Harrison: That is objected to as incompetent, irrelevant and immaterial, if the Court please.

(Testimony of George B. Burnham.)

The Court: It is very difficult for me to rule on that. I don't know what you are talking about. Did you say, was there any action against the American Potash Company by the Pacific Coast Borax Company?

Mr. Carr: Yes, was there any action by the Pacific Coast Borax Company against the American Potash Company for infringement of a patented process?

The Court: You are speaking of a legal proceeding?

Mr. Harrison: That is clearly immaterial. [75]

The Witness: Yes, there was a legal proceeding.

Mr. Harrison: Just a minute, please.

Mr. Carr: Yes, don't answer, Mr. Burnham, until the Court rules. The answer may go out.

Mr. Harrison: That is objected to as incompetent, irrelevant and immaterial. That has no bearing on the knowledge on the part of this plaintiff or his belief.

Mr. Carr: It is another instance of lulling of this plaintiff, why this plaintiff was lulled into inactivity. It is another illustration.

Mr. Harrison: We object on two grounds, if your Honor please: first, we object on the ground that no such lulling was pleaded and it is incompetent, irrelevant and immaterial. In the absence of any communication to the plaintiff——

The Court: I don't understand what the point is.

Mr. Carr: The Pacific Borax Company brought

(Testimony of George B. Burnham.)

an action against the American Potash & Chemical Company for an infringement of a patent and it was through that action and by that action that plaintiff was led more conclusively to the belief that there was no cooperation between these people and that as Mr. Zabriskie had told them that there was no combination or violation of any Anti-trust Laws.

The Court: How could that be fraudulent concealment if there was a lawsuit between the two of them?

Mr. Carr: But it tended to convince. It was not [76] fraudulent concealment, but I mean as a step which led this plaintiff in this case to the further confirmation of the truth of Zabriskie's and Emlaw's statements.

Mr. Harrison: We submit we are not responsible for that, if the Court please, and it is not material at this point or at all.

The Court: This was an action of record in the courts, was it, Mr. Carr?

Mr. Carr: Yes, your Honor. It went over two or three years.

Mr. Harrison: If there were such a suit there would be nothing fraudulent or concealed about it. We submit it is incompetent, irrelevant and immaterial.

Mr. Carr: It is substantially the reason why Mr. Burnham confirmed his belief in the correctness of the Zabriskie statement.



(Testimony of George B. Burnham.)

Mr. Harrison: In other words, Counsel seems to claim because there was a dispute four years ago after the event between two parties that for some reason or other tends to prove this gentleman's belief in what happened four years before. I don't quite understand, but that seems to be the claim, and we object as utterly immaterial.

The Court: I will sustain the objection, Mr. Carr.

Mr. Carr: Pardon me a moment, your Honor?

The Court: Yes. [77]

Mr. Harrison: May I ask your Honor to state to the Jury that any statements made on matters are not evidence?

The Court: You mean the statements by the counsel?

Mr. Harrison: Yes, statements made by counsel.

The Court: I thought I covered that.

Mr. Carr: Yes.

The Court: I spoke of the arguments by the Court and counsel and I meant to include the statements of counsel as well as the statements of the Court. Neither of them are evidence in the case, ladies and gentlemen.

Mr. Carr: Your Honor will pardon me; in view of your ruling we will have to modify our situation.

The Court: Would you like to have a recess at this time?

Mr. Carr: It might be a good idea and then we can accomplish two purposes.

(Testimony of George B. Burnham.)

The Court: All right. We usually take a recess around three o'clock anyhow. We will take it a little earlier today.

Please bear in mind the admonition of the Court.

(Recess.) [78]

Q. (By Mr. Carr): Mr. Burnham, at any time from May 17, 1929 to October 10, 1939, inclusive, did you believe that the business of the Burnham Chemical Company had been damaged by any acts of the defendant, or some of them, in violation of the Anti-trust Laws of the United States?

A. No.

Mr. Carr: I will skip over; in compliance with your Honor's ruling I will go to just one more:

Q. Mr. Burnham, on or about October 19, 1937 did you have a conference with Mr. Emlaw and Mr. F. C. Baker?      A. Yes.

Q. That is the same Mr. Emlaw who you stated was an officer previously of the American Potash & Chemical Company.      A. Yes, it is.

Q. Do you know whether or not at that time Mr. F. C. Baker was any officer of that corporation?

A. He is also an officer of the American Potash & Chemical Corporation.

Q. He was at that time?

A. I believe so, yes.

Q. What officer was he, if you know?

A. Well, he was a director, but I know Mr. Emlaw was the president.

(Testimony of George B. Burnham.)

Q. Where was this conference held?

A. In New York City. [79]

Q. In the office——

A. Of the American Potash & Chemical Company.

Q. What was that conversation?

Mr. Harrison: That is objected to, if the Court please, on the ground that no representation by these gentlemen in 1937 is pleaded or relied upon in the complaint. The complaint relies solely upon the representations made by Mr. Zabriskie on May 17, 1929.

The Court: Is this offered along the same line as the testimony with respect to the previous conversation?

Mr. Carr: Yes, your Honor, with Zabriskie.

The Court: I will overrule the objection.

Q. (By Mr. Carr): Will you answer, Mr. Burnham? What was the conversation?

A. That conversation lasted quite a while. First, I asked Mr. Emlaw if his company would be interested in financing our potash lease at Searles Lake, that we were about to lose our potash lease, but if we could have some finances we could continue to hold it, and we would like to know if they would help us in the financing and the development of our leased property.

Mr. Emlaw replied that when they first got their land from the Government in 1918, got their patent to the land, there, from the Government, that they agreed with the Government at that time that they would not finance any other lessee on [80] Searles Lake or any other party on Searles Lake, and



(Testimony of George B. Burnham.)

thereby establish a monopoly; that therefore they would not consider financing our lease, due to the promise they had made to the Government in 1918.

Then I also asked Mr. Emlaw who controlled the American Potash & Chemical Corporation. He said that it was the Goldfields Consolidated of South Africa, that they held 80 per cent of the stock in the American Potash & Chemical Company.

Then I asked Mr. Emlaw, I said, "Why don't you people go into the small package borax business, like the Pacific Coast Borax Company? The Pacific Coast Borax Company put up borax in small packages and sell it as 20 Mule Team Borax. Why don't the American Potash & Chemical Company also put their borax up in small packages and sell it?" I asked him, "Do you have some understanding with the Pacific Coast Borax Company to keep out of the small package business?"

They said, "No, they did not, that there was no understanding between them," and I said, "Well, it would seem the normal thing to get in that line of business, too," and I couldn't understand why they kept away from that business, and wasn't it due to some agreement they had with them.

Mr. Emlaw said no, not at all. The reason they did not get into the small package business is because it required a great deal of advertising and a well organized system of distribution; that the Pacific Coast Borax Company had built up [81] a marvelous system of distributing borax in small packages, and therefore they did not get into that line of business.

(Testimony of George B. Burnham.)

And I said, "Still, is there not some connection between you as a reason why you do not go into the small package business?"

And they said, "No, there is no connection between us, at all, between the two corporations."

Q. Those corporations to which you are referring are what?

A. The Pacific Coast Borax Company and the American Potash & Chemical Corporation.

Mr. Carr: Your Honor, in view of your Honor's ruling, we can go no further with our questions at this time. We do that, however, in view of your Honor's ruling, and with the expectation that we can open up on redirect examination anything that might develop on cross-examination in this proceeding. Cross-examine, Mr. Harrison.

#### Cross-Examination

By Mr. Harrison:

Q. Mr. Burnham, you testified this morning that you are the president of the plaintiff corporation, Burnham Chemical Company? A. Yes.

Q. That is correct? A. Yes.

Q. And you said you had been president except for a period of a year; did I understand you correctly, or thereabouts? [82]

A. Approximately a year in 1921, and several months along about 1927.

Q. But aside from the months in 1927 you have been president of the Burnham Chemical Company ever since 1922? A. That is right.

(Testimony of George B. Burnham.)

Q. The few months in 1927 were comparatively short, were they not?      A. Yes.

Q. And at all times it is fair to say since 1922 you have been acting in executive charge of the business of the plaintiff?      A. Yes.

Q. You own a majority of the stock of the Burnham Chemical Company, do you not?

A. Yes.

Q. And that has been true ever since 1922?

A. Yes.

Q. Will you produce, please, Mr. Burnham, your copy of the letter to Mr. Thurman Arnold, dated November 22, 1939?

A. It is in my black suitcase.

Mr. Carr: Get it, Mr. Burnham.

A. This is the copy here, of the letter that I wrote to Thurman Arnold on November 22, 1939.

Q. (By Mr. Harrison): On that day you sent the original of which the carbon copy you hold in your hands is a true copy through the United States mails, did you not?      A. Yes. [83]

Q. Mr. Arnold, to whom the letter is addressed, was at that time an Assistant Attorney General of the United States, in charge of anti-trust prosecutions, was he not?      A. Yes.

Q. Will you me the letter, please? That was signed by you before it was forwarded?

A. Yes.

Mr. Harrison: We offer the letter in evidence, if the Court please, as Defendants' Exhibit A.



(Testimony of George B. Burnham.)

(The document in question was thereupon received in evidence and marked Defendants' Exhibit A.)

Q. (By Mr. Carr): Have you an extra copy of that letter?

A. No, that is the only one I have.

Mr. Carr: You are going to read it?

Mr. Harrison: I will read it, yes.

The Witness: Wait a minute. Maybe I have an extra copy. Yes, I had forgotten I do have another copy (handing a copy of Defendants' Exhibit A to Mr. Carr.)

Mr. Harrison: Ladies and gentlemen of the jury, this is Defendants' Exhibit A, which has just been introduced in evidence:

“Washington, D. C., November 22, 1939.

“Mr. Thurman W. Arnold,  
Assistant Attorney General,  
Department of Justice,  
Washington, D. C.

“Attention: Mr. Wendel Berge.

“Dear Sir:

Referring to a conversation which I had with Mr. Berge the other day, I understand that the Anti-Trust Division of the Department of Justice is investigating the alleged violation of the Sherman Anti-Trust Laws by the Fertilizer Industries. Pot-

(Testimony of George B. Burnham.)

ash is one of the principal fertilizer ingredients used by agriculturalists and much of the potash produced in this country comes from Searles Lake, in California. The value of the borax and other boron chemicals produced from Searles Lake is about equal to the value of the potash. Both chemicals are recovered from the brine during its process of treatment. Therefore, the selling price of potash is dependent somewhat on the selling price of borax. The American Potash & Chemical Co. is producing all the potash now made at Searles Lake, Calif. The only other source of potash in the United States besides Searles Lake is the Carlsbad potash field in New Mexico. The principal producer there is the United States Potash Co. and it is controlled by the Pacific Coast Borax Co., who produce borax at Kramer, California. Therefore, this borax producer also has an influence over the price of potash. The American Potash & Chemical Corporation and the Pacific Coast Borax Co. are both English-owned companies, and the two together constitute the British Borax Trust. Hence, [85] the price of potash in America is practically under the control of the British Borax Trust.

The Burnham Chemical at one time had a Government lease at Searles Lake, and was planning to make potash, borax and other chemicals from that deposit. We completed a plant in 1928 for the production of borax, and we expected, through the profits we made in borax, to add a potash plant and

(Testimony of George B. Burnham.)

also make other chemicals and gradually grow to become a large producer. Borax was selling for over \$60.00 a ton f.o.b. Searles Lake, and the Burnham Chemical Co. estimated it could produce borax for \$25.00 a ton in a small plant with its patented solar processes; and so make sufficient profit to enable it to grow and make potash and other chemicals.

However, the very month the Burnham Chemical Co. started production of borax, in June, 1928, a drastic cut in the price occurred, with the result that, in a few months, we were forced out of business. From outward appearances, it appeared that the price war on borax was between the two big English producers—namely, the American Potash & Chemical Corporation and the Pacific Coast Borax Co. The fact that the main price cutting in the price war started the month we began production convinces us that it was aimed purposely to destroy us. At least that was the resulting effect of the price war. [85-A]

We took the matter up with our attorneys, Francis J. Heney and B. D. Townsend, to see if we did not have a case against the Trust for violating the Sherman Anti-Trust Laws. These attorneys, who are now both deceased, felt that we had a case, but we were so completely ruined as a result of the price war, and also in debt, that we were financially unable to employ the attorneys to go ahead with the matter.

As time goes on, more evidence has been gathered to show that the two British-owned borax and pot-



(Testimony of George B. Burnham.)

ash producers in this country are building up a monopoly to drive out all American competition. And so, since you are making an investigation of the fertilizer industries, I am bringing our situation to your attention at this time.

Enclosed you will find a copy of a letter written by Mr. B. D. Townsend to H. S. Hinrichs, dated July 26, 1928, in which Mr. Townsend points out certain features of the unfair methods of competition being used by the British Borax Trust.

There is also enclosed the preliminary draft of an article entitled "Foreign-Owned Monopoly vs. the People of the United States." It is really a history of the Burnham Chemical Co. This article is not completed and should be treated confidentially until such time as the author desires to put it in finished form.

I am also enclosing a letter dated November 18, 1939, [85-B] which I have just written to the Secretary of the Interior, asking that we be granted a new lease on Searles Lake, and suggesting Government financial aid to develop the lease. There may be something in all the enclosed data which will be helpful to you.

If there is anything further that I can do to assist you in your investigation, I will be very happy to do so.

Yours very truly,

G. B. Burnham,  
214 E. C. Lyon Bldg.,  
Reno, Nevada."

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): Now, you testified this morning and this afternoon that you believed what Mr. Zabriskie had told you until the year 1944, did you not? A. Yes.

Q. I will ask you if you recall giving your deposition in this case during February and March of this year? Do you recall giving your deposition?

A. Yes.

Q. I will ask you whether, on March 14, 1947, you gave this testimony under oath. I am now reading from page 476. Have you a copy there, Mr. Burnham? A. Yes.

Q. I will be glad to have you follow this with me. I am reading from page 476, line 12:

“Q. You mean to say that when in 1928 or 1939 the [86] American Potash & Chemical Corporation openly went to the Department of the Interior and openly bid for more land, that made you think that in 1928 their price-cuts were a conspiracy with the Pacific Coast Borax Company to drive you out of business?

A. Well, I believe Zabriskie and Emlaw—I believed they were trying to tell the truth until November, 1939, when lo and behold, they were attempting to get all of Searles Lake, or nearly all of Searles Lake.

Q. So in November, 1939 you no longer believed that they had told you the truth?

A. Well, I was wondering then. These new things had come up that did not coincide with what they had told me.”

(Testimony of George B. Burnham.)

Did you so testify?

A. Yes.

Q. I call your attention also to your testimony two pages later, page 478 of the deposition, line 6. The question was:

“Q. So when you decided in 1939 that he,” that is Emlaw, “had not been telling the truth——

A. Yes.

Q. (Continuing)——that led you to believe that in 1928 the price cuts had been aimed at you after all, is that not so?

A. I was getting suspicious again. I was wondering. I had no knowledge or no facts but here on October 19, 1939, [87] the American Potash & Chemical Corporation was bidding for nearly all of Searles Lake and the Pacific Coast Borax Company did not put in any bid. Did they have an understanding between them not to bid against each other? Those are the things that I was turning over in my mind in November, 1939.”

Did you so testify?

A. Yes.

Q. And after having given your deposition you went over the deposition and made any corrections that you desired, did you not? A. Yes.

Q. And you did not make any correction in that testimony, did you?

A. Except that one word “was” was inserted.



(Testimony of George B. Burnham.)

Q. The word "was" was transposed and I read it as corrected, did I not?

A. That is right.

Q. You referred in your complaint in this case, in paragraph 73, to the fact that on or about June 20, 1925, a Post Office fraud order was issued against the plaintiff and yourself as president, and all mail sent to the plaintiff at its office in Reno, Nevada, was ordered returned to the sender, and you alleged that at that time you had a certain package business, and that upon the issuance of the fraud orders the plaintiff [88] was prevented from receiving through the mails the said orders for said packaged borax and was obliged to commence the production and sale of borax in carload lots; you recall those allegations, do you not?      A. Yes.

Mr. Carr: I would like to enter an objection to any reference to the complaint. We offered it in evidence this morning, or rather, offered to read it, and your Honor sustained an objection and said we were not entitled to that, and you instructed the jury, as I recall, that the allegations of the complaint had nothing to do with the situation—maybe not in so many words, but in effect—and on the further order of your Honor you required the testimony in this matter to be confined between the dates of May 17, 1929 and October 10, 1939, so that this has no bearing on the situation, at all. It is incompetent, irrelevant, and immaterial, and your Honor having refused us the right to introduce the complaint, no reference should be made to it at this time.

(Testimony of George B. Burnham.)

The Court: All I ruled was there was no necessity of reading the complaint to the jury.

Mr. Carr: We asked the privilege of doing so.

The Court: If you want to call attention to some portion of the complaint in order to identify some subject-matter in your examination, you will have the same privilege as Mr. Harrison has. [89]

Mr. Carr: We take it in view of your Honor's ruling this morning there can be no reference to anything in the complaint.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): I call your attention, Mr. Burnham, to a certified copy of the Order of the Post Office Department, dated June 20, 1925, and ask you if that is the order referred to in your complaint.

Mr. Carr: For purposes of this trial, your Honor, we renew our objections to this. This antedates the time and period fixed in your pre-trial order, and has no reference whatsoever to the issue. It is not proper cross-examination.

Mr. Harrison: We want to show the knowledge of the witness.

Mr. Carr: May I finish?

Mr. Harrison Excuse me.

Mr. Carr: It is not cross-examination.

The Court: What is the necessity for putting that in, Mr. Harrison?

Mr. Harrison: Well, simply as a foundation, if the Court please. We want to show that the witness

(Testimony of George B. Burnham.)

knew of that order, and then we want to show what statements he made in respect to it in his pleadings in the Carson City suit.

The Court: I think that would be admissible in evidence, but I do not see the relevancy of the Post Office Order, itself, because that antedates any statement the witness may have made. [90]

Mr. Harrison: It is simply a foundation to show the allegation of the complaint, and show the jury what the plaintiff was referring to in that amended complaint, which we propose to offer next in evidence.

The Court: I see no objection to your offering the statements you referred to in your opening statement that were under the signature of the plaintiff in the pleadings in the case. Unless it is necessary to connect it up later, I will sustain the objection without prejudice to the renewal of this offer.

Mr. Harrison: Then may we have the certified copy of the Fraud Order marked for identification?

The Court: Yes, you may have it marked for identification.

(The fraud order in question was thereupon marked Defendants' Exhibit B for Identification.) [91]

Q. (By Mr. Harrison): Now, you recall the fact that the Burnham Chemical Company did file a suit in the District Court for the District of Nevada for the purpose of enjoining the enforcement of that fraud order, do you not? A. Yes.

Q. It is a fact, is it not, that on April 16—

Mr. Carr: Pardon me, may I have a running objection on all questions involving the fraud order



(Testimony of George B. Burnham.)

complaint in Nevada? I object on the ground it is incompetent, irrelevant and immaterial, and antedates the period of time fixed by you Honor in the pre-trial order.

The Court: I don't know what you mean by a running objection.

Mr. Carr: I want to make an objection to each one of them, then.

The Court: Yes, you can make an objection to each question and I will consider each objection. I will overrule your objection now.

Mr. Harrison: We offer in evidence, if the Court please, a certified copy, a photostatic copy of the amended complaint in the case of Burnham Chemical Company against George F. Smith, Postmaster, filed in the District Court of Nevada, April 16, 1926.

The Court: April 16, 1936?

Mr. Harrison: 1926. [92]

Mr. Carr: We renew our objections on all grounds previously stated, if your Honor please.

The Court: Objection overruled.

Mr. Carr: Will that be Exhibit C?

The Clerk: Exhibit C, that is correct.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit C.)

Mr. Carr: We would like to add to those objections that Counsel in his opening statement stated the true facts, which were that subsequently the Federal Court in Nevada issued a restraining order

(Testimony of George B. Burnham.)

setting aside this fraud order which had been made and decided the matter in favor of the plaintiff and restrained the Postmaster from proceeding under such claimed fraud order.

Mr. Harrison: We object to the statement of Counsel as being a misstatement of the fact, not intentional, of course, but none the less misleading. There was no final decision in this case except a dismissal for lack of prosecution. There was a temporary injunction, but we will come to that in a moment, of course; but statements made that are not matters of record have no place here.

Mr. Carr: There was a restraining order issued, restraining the Postmaster from proceeding further with the fraud order.

Mr. Harrison: Only during the pendency and not upon the merits, and in the action upon the merits the case was [93] dismissed for lack of prosecution.

Mr. Carr: And without any notice to plaintiff. Will you stipulate to that, or will you stipulate without any knowledge or notice to the plaintiff?

Mr. Harrison I will not.

The Court: What was your next procedure?

Mr. Harrison: We have offered in evidence the complaint, if the Court please.

The Court: Yes. Now, do you wish to read some parts of it to the jury?

Mr. Harrison: Yes, your Honor.

The Court: All right.

(Testimony of George B. Burnham.)

Mr. Harrison: This is a long document.

The Court: Can't you summarize it in some way?

Mr. Carr: Pick out what you want, Mr. Harrison.

Mr. Harrison: In a general way, this is a statement at some length of the grounds on which the Burnham Chemical Company claims that the Postmaster should be enjoined from enforcing the fraud order. There are certain and very specific and limited parts of it that I should like to read to the jury.

Have you a printed copy of that, Mr. Carr?

Mr. Carr: Yes, we have it here somewhere.

Q. (By Mr. Harrison): I am going to ask you some questions about this, Mr. Burnham, and I have a printed copy of this, [94] so you can follow it, if you wish, because I may wish to ask you some questions about it as I read this to the jury.

(Addressing Mr. Carr): If you have no objection, Mr. Carr, I will read from the printed copy.

Mr. Carr: Yes, but just give me the page.

Mr. Harrison: Page 18, the last clause in Paragraph 8, beginning at Line 13. That reads as follows:

“On February 26, 1925, Dr. Stewart, in response to said letter and pursuant to the aforesaid authority delegated to him by the Secretary of the Interior (at the request of the Postmaster General), submitted to the Post Office



(Testimony of George B. Burnham.)

Department a certain document which is self-named 'A Report,' but the true nature and character of which is hereinafter more accurately described. The contents of said so-called 'report' and the official opinions and actions of Dr. Stewart in the premises, were influenced by certain false and defamatory propaganda and other acts on the part of the competitors of the Burnham Chemical Company, the particulars whereof are essential to a correct understanding of Dr. Stewart's so-called 'report', and therefore will be set forth in the next succeeding paragraph, and before setting forth the particulars concerning said so-called 'report'——

Q. Now, Mr. Burnham, who was Dr. Stewart referred to in that statement? [95]

A. He was one of the officials in the Bureau of Mines of the Department of the Interior.

Q. And he had been requested by the Postmaster General to look into the matter of these charges against your company, had he not?

A. He was appointed by the Secretary of the Interior.

Q. And the Secretary of the Interior appointed him at the request of the Postmaster General, did he not?      A. Yes.

Q. And he subsequently made the report referred to in this allegation?

A. He made the report. He did not go into the plant.

(Testimony of George B. Burnham.)

Q. But he made the report? A. Yes.

Q. And that is the report which is referred to here? A. Yes.

Q. Then, you refer in this statement to certain false and defamatory propaganda and other acts on the part of the competitors of the Burnham Chemical Company: What competitors did you refer to when you made that allegation?

A. I had in mind all the competitors.

Q. Well, who were the principal competitors?

A. American Potash & Chemical Company and the Pacific Coast Borax Company.

Q. Defendants in this case? [96]

A. Yes.

Q. Now, I will read the title to the next paragraph—immediately following, Mr. Carr.

IX is entitled, in black print, “Defamatory Propaganda by Borax Trust Against Burnham Chemical Company and Burnham Solar Process.”

To whom did you refer by the terms “Borax Trust” in the title of Paragraph IX?

A. I referred to the American Potash & Chemical Company and the Pacific Coast Borax Company as that was the customary name in the trade to designate them.

Mr. Harrison: I move to strike out everything beginning with the words, “as that was the customary name.”

The Court: Yes, that may go out.

(Testimony of George B. Burnham.)

Mr. Harrison: I read from the bottom of the same page at Line 49:

“Thus, not only will both of said companies be affected as competitors by the developments and operations of the Burnham Chemical Company, but both of them are interested in preventing the Burnham Chemical Company, or any other lessee of the Government, from developing or operating any plant or process for the recovery of any of the salts contained in the brine of Searles Lake.”

Q. “Both of said companies” were the Pacific Coast Borax Company and the American Potash & Chemical Company, were they [97] not?

A. Yes.

Mr. Harrison: I continue to read now, following that.

Mr. Carr: Page, please?

Mr. Harrison: Page 19, Line 3:

“By reason of the premises, for more than six years last past, said competitors have engaged in efforts (most of them in secret) to injure and discredit, and prevent the success of, the ‘processes, plans and developments’ of the Burnham Chemical Company. For example: When Mr. McKean visited Searles Lake in September, 1923, as hereinbefore stated, the chief chemist of the American Trona Corporation endeavored to prejudice the Post Office



(Testimony of George B. Burnham.)

Department against the Burnham Chemical Company and its process, by making certain defamatory statements to Mr. McKean."

Q. Now, "said competitors," as referred to in that sentence means the defendants in this case, American Potash & Chemical Company and Pacific Coast Borax Company, does it not?

A. Yes, and the American Trona Corporation.

Q. Well, the American Trona Corporation was simply the former name of the American Potash & Chemical Company, isn't that correct, Mr. Burnham?

A. Yes, that's correct.

Mr. Harrison: Reading further in the same paragraph from [98] Line 17:

"And thereafter said subject was again brought to the attention of the Post Office Department, and the Postmaster General (acting through the aforesaid Mr. Hassell) was persuaded to, and did, request the designation of a chemical engineer of the U. S. Bureau of Mines to make an investigation and report concerning the 'processes, plans and developments' of the Burnham Chemical Company; and Dr. Stewart was assigned to conduct or supervise such investigation and make such report; all as hereinbefore more particularly set forth.

"While these plaintiffs cannot state who induced the reopening of said investigation as aforesaid, plaintiffs do allege that the officers and agents of the aforesaid competitors of the

(Testimony of George B. Burnham.)

Burnham Chemical Company well knew of said assignment of Dr. Stewart and the antecedent facts in the premises hereinbefore stated; and further knew that the Burnham Chemical Company was then about to commence the production of borax. Thereupon, the aforesaid competitors resumed and increased their aforesaid efforts to injure and discredit, and prevent the success of, the 'processes, plans and developments' of the Burnham Chemical Company. Their ultimate objects in the premises were, first to prejudice the general public against the Burnham Chemical Company, so as to defeat the efforts [99] of the company to finance its enterprise through the sale of its capital stock to the public; second, to discourage dealers in borax from dealing with the Burnham Chemical Company, by convincing them that the Burnham Chemical Company would not be able to develop and maintain a dependable production, because of its financial weakness and because of a doubt (falsely induced by said competitors) concerning the practicability of its process. Their immediate object was to prejudice and deceive the Postmaster General and the officers and agents of the Post Office Department engaged in conducting said investigation, and particularly Dr. Stewart and the other officers and agents of the U. S. Bureau of Mines engaged therein as aforesaid, and thereby procure and induce the issuance of a fraud order against the Burnham

(Testimony of George B. Burnham.)

Chemical Company and Mr. Burnham individually. To that end, among other things, the aforesaid competitors of the Burnham Chemical Company, through their officers and agents, influenced, procured and induced the false and defamatory propaganda concerning, and attacks upon, the Burnham Chemical Company and Mr. Burnham individually, hereinafter set forth.

“On August 25, 1924, a false and defamatory editorial, intended to injure and discredit the Burnham Chemical Company and its processes and Mr. Burnham individually, [100] was published in ‘Chemical and Metallurgical Engineering’, a trade journal devoted to the subject of chemical and kindred industries and having a national and international circulation.

“On November 8, 1924, an editorial of like import and intent, was published in ‘Engineering and Mining Journal-Press’, another trade journal devoted to the subject of chemical and kindred industries and having a national and international circulation.

“On September 8, 1924, Mr. Burnham was expelled from the American Chemical Society (of which he was a member) upon the sole ground that in the advertising literature of the Burnham Chemical Company, Mr. Burnham had published the fact that he was a member of said society, as an evidence of his qualifications and standing as a chemist.



(Testimony of George B. Burnham.)

“During the fall of 1924 and early in the year 1925, numerous prospective purchasers of stock in the Burnham Chemical Company addressed to the American Trona Corporation inquiries concerning the Burnham Chemical Company, and in answer thereto the American Trona Corporation referred the writers of said inquiries to one or both of the aforesaid trade journals for information upon the subject, well knowing (and intending) that they would receive in reply the false and defamatory statements contained in said editorials.” [101]

Q. As we have said, American Trona was the former name of the American Potash & Chemical Company.      A. Yes.

Mr. Harrison: Continuing at Line 14 on Page 20:

“By means of said false and defamatory editorials and otherwise, during the fall of 1924 and the early part of 1925, said competitors of the Burnham Chemical Company discouraged dealers in borax from purchasing any of the small quantity of borax which the Burnham Chemical Company then had on hand, and thereby, and otherwise, created the conditions stated and complained of by Mr. Burnham in his letter to Mr. Varley dated February 4, 1925, as hereinbefore stated.

“The officers and agents of said competitors of the Burnham Chemical Company caused said

(Testimony of George B. Burnham.)

defamatory editorials to be brought to the attention and knowledge of Dr. Stewart, within a few days after they were published, respectively, and conveyed to Dr. Stewart divers other false and defamatory statements in the premises, including the false statement (hereinafter mentioned) to the effect that two companies acquired the right to use the Burnham Solar Process, without utilizing it.

“Plaintiffs are informed and believe, and therefore allege, that the aforesaid publication of said defamatory editorials and the aforesaid expulsion of Mr. Burnham [102] from the membership of said society were instigated, induced and procured by, or through the influence of, certain officers and agents of the aforesaid competitors of the Burnham Chemical Company (which officers and agents were intimate friends of the editors of said trade journals and were also officers and members of the American Chemical Society) for the immediate purpose (among others as hereinbefore stated) of influencing the official opinion and action of Dr. Stewart in the premises, and (through Dr. Stewart) the official opinion and action of the officers and agents of the Post Office Department, and particularly the Solicitor for the Post Office Department and the Postmaster General, in the investigation, consideration and disposition of the aforesaid charges against the

(Testimony of George B. Burnham.)

Burnham Chemical Company and Mr. Burnham individually. During all of said times, Dr. Stewart was a member of the American Chemical Society, an intimate friend of the secretary of said society, an intimate friend of the editors of said trade journals, and an intimate friend of many of said officers and agents of the aforesaid competitors of the Burnham Chemical Company, and particularly the vice-president (and consulting chemist) of said American Trona Corporation, who was also an intimate friend of the editors of said trade journals, and a member and an officer of the American Chemical [103] Society; and both the Pacific Coast Borax Company and the American Trona Corporation, as corporations, respectively, were members of the American Chemical Society, and liberal patrons of said trade journals.

“Plaintiffs are informed and believe, and therefore allege, that the aforesaid false and defamatory propaganda and attacks did influence the official opinion and action of Dr. Stewart in the premises; and thereby, and otherwise, did influence and induce the subsequent official opinion and action of the Solicitor for the Post Office Department and the Postmaster General, respectively, as hereinafter set forth.”

Then, at the top of the next page——

Mr. Carr: What page?



(Testimony of George B. Burnham.)

Mr. Harrison: Page 21: The heading of Paragraph X reads as follows in bold type:

“False and Misleading ‘Report’ by Dr. Andrew Stewart Concerning Investigation by U. S. Bureau of Mines.”

On that same page, Subdivision (b) reads as follows:

“Notwithstanding the premises, influenced by the aforesaid false and defamatory propaganda and attacks instigated by the officers and agents of the competitors of the Burnham Chemical Company, Dr. Stewart submitted to the Postmaster General a certain document dated February 26, [104] 1925, which was entitled and purported to be a ‘report’ of the results of the investigation by the U. S. Bureau of Mines of the ‘processes, plans and developments’ of the Burnham Chemical Company; but which in fact concealed and misrepresented the true facts in the premises, and consisted mainly of a repetition of the false and defamatory propanganda disseminated by the competitors of the Burnham Chemical Company as aforesaid, disguised in new verbiage, and presented to the Postmaster General and the Post Office Department, ostensibly as the impartial views of the U. S. Bureau of Mines.”

The next is on Page 24 at Line 11:

“that the difficulties encountered by Mr. Burnham in marketing said small amount of borax

(Testimony of George B. Burnham.)

then on hand were created by the aforesaid competitors of the Burnham Chemical Company for the express purpose, among other things, of discrediting the Burnham Chemical Company and furnishing some false and fictitious ground upon which a fraud order could be based; and that said monopolistic restraint of the commerce in borax was and is a flagrant violation of the laws of the United States, and could and should be prohibited by criminal and civil proceedings instituted by the United States; and Dr. Stewart further knew that said circumstances demanded the prosecution of the Borax Trust under the Anti-Trust Laws of the United States, but [105] did not warrant or justify the prosecution of the Burnham Chemical Company or Mr. Burnham under the Postal Laws of the United States."

Q. You refer to the defendant American Potash & Chemical Company and Pacific Borax Company, do you not?      A. Yes.

Mr. Harrison: The next is on Page 25, at Line 4, which reads as follows:

"By reason of the premises, Dr. Stewart's so-called 'report' was in effect a complaint or petition on the part of the competitors of the Burnham Chemical Company, with the true authorship of said document concealed, to procure and induce the issuance of a fraud order in the premises, for the purpose of destroying

(Testimony of George B. Burnham.)

the Burnham Chemical Company, and thereby averting competition (otherwise inevitable) in the production of borax, potash and other salts from the brine of Searles Lake; and for the further purpose of enabling the Borax Trust to maintain its monopoly of the commerce in borax, in violation of the laws of the United States." [106]

The next is page 73. Paragraph XXVIII of the complaint is entitled in bold type: **Attitude of Stockholders Since Issuance of Fraud Order**. This reads as follows:

"Since the promulgation of the fraud order as above stated, the Burnham Chemical Company and Mr. Burnham have communicated the general circumstances thereof to each and all of the stockholders. Many of the stockholders have responded to these communications. Almost unanimously they have expressed implicit confidence in, and approval of, the Burnham Chemical Company and its officers."

Now, referring to line 47, page 73:

"Prior to the time of the issuance and promulgation of the fraud order, the Burnham Chemical Company and its officers enjoyed a good reputation, and good commercial credit. The immediate effect of the fraud order was to taint the reputation of the company and its officers with suspicions of fraud and dishonesty, and greatly impair their commercial



(Testimony of George B. Burnham.)

credit. With its credit impaired, and its financial resources virtually destroyed, the company has become involved in heavy legal expenses, for the purpose of annulling the fraud order which has been unjustly and unlawfully issued and promulgated as hereinbefore stated. In the meantime, the company must enter into competition with a strongly entrenched foreign-owned [107] trust, which controls nearly 90 per cent of the borax trade of the world, and which is keen to take advantage of every weakness of its competitors. Already, the fact of the issuance of the fraud order and the effects of it have been extensively published and advertised with every possible derogatory and damnifying insinuation and innuendo."

Now, referring to paragraph XXX on page 75, which is entitled: Additional Facts Concerning Efforts of Borax Trust to Preclude Development of Burnham Solar Process; Concealment Thereof from Solicitor and Postmaster-General.

As part of that paragraph. on page 76 at line 13 the following reads:

"Plaintiffs allege that by their unlawful violation of their contractual obligations, and their subsequent unlawful assertion of rights adverse to Mr. Burnham as hereinbefore stated, the Pacific Coast Borax Company and the Solvay Process Company intended, and attempted, to render Mr. Burnham financially helpless and

(Testimony of George B. Burnham.)

permanently preclude the development of the Burnham Solar Process, for the reason that it would virtually destroy the value of their existing plants, constructed and installed to operate under more expensive processes, with an investment exceeding \$30,000,000.

“The Pacific Coast Borax Company also endeavored to preclude the development of the Burnham Solar Process, by means of their application for a lease of virtually all of the public land at Searles Lake, suitable for solar ponds, as hereinbefore stated. Had said application been granted, it was the intention of the Pacific Coast Borax Company to construct solar ponds covering said entire area of 3100 acres; and such ponds would have been of sufficient capacity to have enabled the Pacific Coast Borax Company, within five years, to have exhausted the entire chemical deposit of Searles Lake, and to have transferred it to the ponds of the Pacific Coast Borax Company; and thereby the Pacific Coast Borax Company would have secured virtually a permanent monopoly of the production of potash and borax in the United States, so far as concerns the present known deposits thereof. It was upon this ground, among others, that Mr. Burnham protested against, and the Secretary of the Interior denied, said application for lease by the Pacific Coast Borax Company, acting through its subsidiary as hereinbefore stated.”

(Testimony of George B. Burnham.)

Q. Those statements are contained in the complaint, are they not, Mr. Burnham?

A. Yes.

Q. And you signed that and verified that on April 9, 1926, did you not? A. Yes.

Q. And you declared under oath those facts were true of your [109] own knowledge, except as to the matters stated on information and belief, and as to those matters you believed it to be true?

A. Yes, and I signed the document.

Q. That is what it states, does it not? Will you read it, if you have any doubt about it? Read that last page. A. Yes.

Q. You so stated? A. Yes.

Q. Have you that diary for 1925, the little notebook. A. Yes, I have it here.

Q. Will you turn to the entry about June 23, 1925, to June 30, 1925, which relates to the Post Office fraud order?

A. Do you know how the entry begins to read?

Q. "We draw upon the source of the complaint. We prefer not to surmise."

A. Yes, I have it here.

Q. And that appears about what date?

A. It was after June 23, 1925, and before June 30, 1925.

Q. Does that memorandum state your own reflections at that time? A. No.

Q. What does it state?

Mr. Carr: We object to that, may it please your Honor, upon all of the grounds previously stated;



(Testimony of George B. Burnham.)

that antedates the [110] fixed dates by your Honor and is incompetent, irrelevant and immaterial, by reason of such order by your Honor.

The Court: I will overrule the objection. You have stated several times, Mr. Carr, that it antedates the order fixed by me. I made no order limiting the testimony in the case.

Mr. Carr: Your pre-trial order states, may it please your Honor, in so many words, "At any time from May 17, 1929,"—that you were going to ask the jury to decide this matter with regard to the dates between May 17, 1929, to October 10, 1939, during that time did plaintiff know or have good cause to know. Your Honor fixed definite times between which this knowledge must have been had.

The Court: I understand that, but that did not mean that the party could not put in evidence of some statement either prior or after that time that would reflect the state of mind or belief of the party during that period. I did not intend to limit the evidence in the case.

Mr. Carr: Very well, your Honor.

The Court I merely state that because you made a statement several times that I made an order limiting the time. I have not attempted to do that.

I will overrule the objection. [111]

Q. (By Mr. Harrison): Now, the entry we have been discussing, Mr. Burnham, was made sometime between June 23, 1925 and June 30, 1925, was it not?           A. Yes.

(Testimony of George B. Burnham.)

Q. And that was only a few days after the Fraud Order was issued, was it not? A. Yes.

Q. Will you read the entry, please, that was in your own handwriting? A. Yes.

Mr. Carr: Same objection, your Honor.

The Court: Same ruling.

The Witness: I will read just as it is written here.

Q. (By Mr. Harrison): If you will, please.

A. "We do not know upon the source of the complaint. We prefer not to surmise as we are leaving it to attorneys. We do not intend to indulge in any surmises. We have no means of knowing who started it, but it is evident who will be benefitted by it. Production equals that of Trona. We are now casting about ways of saving the situation. Money can't be sent by mail but com—" and the sentence is not finished. "I am wiring the balance of the money I owe them. I would rather fight than surrender. How do you feel about it?"

That is all.

Q. When you said in that memorandum that you do not know the [112] source of the complaint, you referred to the complaint in the Post Office Department, did you not?

A. These are not my thoughts.

Q. Whose thoughts are they?

A. Francis Heney's thoughts.

(Testimony of George B. Burnham.)

Q. Mr. Francis J. Heney was your attorney at that time?           Yes.

Q. He was quite well known, was he not?

A. Yes.

Q. Do these represent the things that Mr. Heney told you?

A. Yes, we were at a meeting, Mr. Heney, Mr. Townsend, and myself, right after the Post Office Fraud Order was issued, and Mr. Heney said that we must write a letter to all the stockholders, telling them what had happened.

Q. Did this represent the suggestion of Mr. Heney as to what should be written the stockholders?

A. Yes, Mr. Heney started, "Now, let's see what we'll say. We will start out this way," and started to dictate a letter, and I wrote down hurriedly his thoughts.

Q. That expressed your belief and state of mind at the time, did it not, when you said, "We prefer not to surmise and are leaving it to attorneys?"

A. That is what Mr. Heney was dictating to me and I was writing it down.

Q. Is it not a fact, Mr. Burnham, that at that time when Mr. [113] Heney made that statement to you, you also had in mind that you did not desire to accuse anybody of having been responsible for getting the Fraud Order until you had something more than a mere surmise?

A. I don't remember exactly what my thoughts were, but these thoughts are the thoughts of Mr. Heney.



(Testimony of George B. Burnham.)

Q. I am asking you now your best recollection as to whether or not that represented your state of mind, that you did not desire to accuse anybody of responsibility for the Fraud Order on the basis of a mere surmise?

A. Yes, that was my thought.

Q. That was your thought at the time, and that continued to be your thought during the following months, did it not?      A. Yes.

Q. Do you recall the affidavit which you filed in this case, which was subsequently printed by you and distributed, with respect to your activities in this case?      A. This affidavit?

Q. Yes.

Mr. Carr: Which case?

Mr. Harrison: This present case.

The Witness: Yes.

Q. (By Mr. Harrison): I call your attention, Mr. Burnham, to your reference in that affidavit which you filed in this case——

The Court: The case on trial? [114]

Mr. Harrison: The case on trial, if the Court please.

Q. (Continuing): ——and particularly to the reference which appears on page 6 of the typewritten affidavit in the first column of page 2 of the printed affidavit, referring to the amended complaint in the Post Office Fraud Order case, and I call your particular attention to the statement there as follows: “Said plaintiff based its charges——” referring to the charges in the amended complaint

(Testimony of George B. Burnham.)

——“largely upon hearsay and upon the grounds that said plaintiff had done nothing fraudulent.” You recall having made that statement in your affidavit, do you not?

A. Yes, that is under Section A.

Q. Under Section B.                      A. Oh.

Q. Do you see it there? “Said plaintiff based his charges”——and those are the charges in your amended complaint which I read to the jury——“largely upon hearsay and upon the grounds that plaintiff had done nothing fraudulent.”

A. I do not see it here but it must be there.

Q. Just to save time, Mr. Burnham, I will indicate it to you (indicating).                      A. Oh, yes.

Q. Now, I would like to direct your attention to that statement [115] and ask you what hearsay, what reports you had received upon which you based these charges in the amended complaint that the Borax Trust had influenced Dr. Stewart and had induced the Fraud Order.

Mr. Carr: We renew our objection, and furthermore, it is incompetent, irrelevant, and immaterial. This is not impeachment nor is it cross-examination.

The Court: What is the competency of this?

Mr. Harrison: I will put it more directly, if the Court please.

Q. Is it not a fact that Dr. Atwood and other stockholders of the company had informed you that these competitors of yours were endeavoring to injure you and bring about the adoption of the fraud order?

(Testimony of George B. Burnham.)

Mr. Carr: We renew our objection upon all the grounds stated, and in addition it is not cross-examination, nor is it impeachment in any sense of the word of the testimony.

The Court: Are you asking this question to show knowledge?

Mr. Harrison: Knowledge, if the Court please.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): Did you understand the question?

Mr. Carr: It could not be knowledge if it was given by a third party. The hearsay rule would apply.

Mr. Harrison: We are entitled to show knowledge conveyed [116] to him, if the Court please.

Mr. Carr: It is just what somebody else told him, not knowledge on his part.

Mr. Harrison: Under that theory we could not show knowledge except by showing he was actually present when something was done.

Mr. Carr: Certainly. Suppose somebody came to him on the street——

The Court: I will overrule the objection.

Mr. Carr: Suppose somebody came to him on the street and told him that. Would that be knowledge?

The Court: That is not the case here. The question is directed to information as to whether or not the stockholders of his own company did not tell him about the activities, alleged activities of the defendant. I think the question was to that effect.

Mr. Carr: How could they know, any more than Mr. Burnham knew, of the secret activities of these people?



(Testimony of George B. Burnham.)

The Court: The objection is overruled.

Q. (By Mr. Harrison): Mr. Burnham?

A. Well, some of the stockholders stated that it looked to them as though our competitors had, might have had something to do with the Post Office Fraud Order, but they had no knowledge of it.

Q. Didn't you believe them sufficiently to include these [117] charges in the amended complaint, that your competitors had brought about the stop order, and didn't you describe it as the borax trust? You believed, in other words, these stockholders sufficiently to include all of those charges under oath in the complaint, did you not?

A. It seemed to me if these two companies were doing all the things that they appeared to be doing, that they must be violating some law and they ought to be prosecuted, but I had no information on the matter.

Q. You felt you had enough information so you could swear that you believed those charges, did you not?

A. No, it was all on suspicion, that perhaps they were behind the fraud order, but I had no knowledge whatever.

Q. Don't you recall, Mr. Burnham, that you swore that those allegations were true to the best of your knowledge and belief, that you believed them to be true?

A. Well, I believed that they should be prosecuted if they were really causing our trouble, but I

(Testimony of George B. Burnham.)

did not know at the time what the law was on the subject. I had no clear understanding on it.

Q. Did you or did you not believe the statements of fact contained in that amended complaint to be true at the time you signed it?

Mr. Carr: We renew our objection, if your Honor please. That is incompetent, irrevelant, and immaterial. The question [118] has no bearing. It is not cross-examination. It has nothing to do with this situation. There is nothing to show what his belief was or indicate his belief between May 17, 1929 and the other date, October 10, 1939. There is nothing to show his belief or his knowledge at that time.

The Court: Overruled.

Mr. Harrison: Will you read the question, Mr. Reporter?

(Question read.)

A. Statements of fact, of course, I believed to be true, but I had no knowledge that our competitors were really actually conspiring against us.

Q. (By Mr. Harrison): You read that complaint before you signed it, did you not?

A. Yes.

Q. You had it printed, did you not?

A. Yes

Q. How many copies did you have printed?

A. I sent copies to all the stockholders.

Q. How many copies would that make?

A. 7000.

(Testimony of George B. Burnham.)

Q. You had 7000 copies and all the copies included the charges I read to the jury, did they not?

A. Yes.

Q. Who prepared that complaint?

A. Our attorney. [119]

Q. When you signed it you thought Mr. Townsend had cause to put that charge in the amended complaint, did you not?

A. I had a great deal of confidence in Mr. Townsend and Mr. Heney.

Q. I am asking you the question whether at the time you signed the complaint you believed that Mr. Townsend had cause to put those charges in the complaint; did you or did you not believe?

Mr. Carr: We renew our objection, if your Honor please, on the grounds previously stated.

The Court: The objection is overruled.

A. Yes, I believed he had good grounds to put it in the complaint.

Mr. Harrison: May we have an adjournment now, if your Honor please?

The Court: We will take a recess until tomorrow morning at ten o'clock, ladies and gentlemen. I will ask you in the meantime to bear in mind that you must not talk about the case among yourselves or with anybody else, nor are you to form or express any opinion until the case is finally submitted to you for determination. We will recess until tomorrow morning at ten o'clock.

(An adjournment was thereupon taken until tomorrow, Friday, March 28, 1947, at 10:00 o'clock a.m.) [120]



Friday, March 28, 1947

10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready your Honor.

Mr. Carr: May it please your Honor, may we temporarily withdraw Mr. Burnham and call another witness?

The Court: Very well.

Mr. Carr: Mr. Gauge, will you take the stand, please?

WILLIAM ARTHUR GAUGE

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Q. Will you state your name to the court and jury?

A. William Arthur Gauge.

Direct Examination

By Mr. Carr:

Q. What is your business, Mr. Gauge?

A. I was administrator for the Estate of W. R. Devin, and for the past years in connection with that duty I have also been a buying agent for clients abroad.

Q. Have you any connection with the firm of Gauge & Devin?

A. Yes, sir, that is the name of our concern in which I am a partner.

Q. How long have you been in that business, Mr. Gauge? [121]

A. About fourteen years.

(Testimony of William Arthur Gauge.)

Q. Do you know Mr. Jenifer, of the Pacific Coast Borax Company?      A. I do.

Q. How long have you known him?

A. About fourteen years.

Q. What is his connection with that company?

A. At that time he was either the manager or he was in charge of the Pacific Coast Borax Company, of Los Angeles.

Mr. Harrison: At what time is the witness referring?

Mr. Carr: Yes, at what time? Fix the time, will you, Mr. Gauge?      A. The time?

Q. Yes.

A. I would say about thirteen or fourteen years. It is pretty hard to remember back.

Q. Steadily, continuously preceding this date?

A. Continuously up to about 1938, '40, some place along in there.

Q. You mean prior to that date. Do you know whether he is an officer of that company today?

A. Yes, sir, he is an officer of that company today.

Q. What is that office?

A. As far as I know, he is the manager of the Pacific Coast Borax Company. I do not know his exact title.

Q. Do you know Mr. Gerstley, connected with that concern? [122]      A. I do.

Q. What is his full name?

A. As far as I know, it is James H. Gerstley, but I have not seen him for a number of years. I don't know.

(Testimony of William Arthur Gauge.)

Q. How long have you known him?

A. About a year less than my acquaintance with Mr. F. M. Jenifer.

Q. Where were those gentlemen located? I mean in what city, during the time you have stated?

A. In Los Angeles.

Q. Did you ever do any business with the Pacific Coast Borax Company?

A. I did, when I was administrator for the Estate of W. R. Devin.

Q. What was that business?

Mr. Harrison: That is objected to as immaterial, unless some connection is shown to the issue before the jury, if the Court please.

Mr. Carr: That is a preliminary question.

The Court: You mean you just want him to state the general nature of the business?

Mr. Carr: Yes, your Honor.

The Court: Preliminary to developing some other fact?

Mr. Carr: Yes, your Honor.

The Court: I will allow it.

A. We, the Estate of W. R. Devin, had a contract with the [123] Pacific Coast Borax Company.

Q. (By Mr. Carr): What was the contract in reference to?

A. It was in reference to the supplying of borax for shipment to the Orient.

Q. Borax? A. Borax and borate ores.

Q. When was that contract entered into?



(Testimony of William Arthur Gauge.)

Mr. Harrison: That is objected to as immaterial, if the Court please.

The Court: Can't you shorten this? You want to develop that the witness had some business transactions with the Borax Company—during what period of time is this?

The Witness: About 1938—1932 to about 1938, sir.

The Court: Go ahead with your next question.

Q. (By Mr. Carr): Did you buy borax from the Pacific Coast Borax Company? A. I did.

Q. And resell? You resold it in the Orient, is that correct? A. That is correct.

Q. Who controlled the price of the sale?

Mr. Harrison: I object to that as immaterial, if the Court please. I do not know what the purpose of counsel is, or the materiality.

Mr. Carr: I submit it, your Honor. It just fits them into the conspiracy in question, alleged in our complaint. [124]

The Court: I do not understand what you mean by the question of who controled the price. You are asking the witness to give an opinion about some matter?

Mr. Carr: I withdraw the question.

The Court: I just do not understand what you are getting at.

Mr. Carr: I withdraw that question.

Q. This contract that you had with these people, the Pacific Coast Borax Company, was there any provision in it as to the resale price?

(Testimony of William Arthur Gauge.)

Mr. Harrison: That is objected to as immaterial, if the Court please. I do not see that that has anything to do with the sole issue presented to the jury, that is to say, whether——

The Court: What is the purpose of this, Counsel?

Mr. Carr: The purpose is to show the conspiracy, and we have certain letters here from one conspirator to possibly another. These are statements made by one of the conspirators in the course of the conspiracy, and it all goes to show the secretness and the hiding which is alleged in our complaint, and which is denied by the defendant.

The Court: That goes to the matter of whether or not there was a conspiracy.

Mr. Harrison: Exactly.

Mr. Carr: No, your Honor, because the conspiracy has been admitted. [125]

Mr. Harrison: We do not concede that.

Mr. Carr: The conspiracy has been admitted. It is alleged in the complaint and it is not denied by the defendants in this hearing.

The Court: We have gone into that. I am not going to permit this case to get into the area of the merits of the case, and if I did so, it would be error, and any verdict that the jury might render on the basis of any such evidence would be wholly without foundation, and even if I did not upset it the higher court would; so there is no use getting into that phase of the case.

(Testimony of William Arthur Gauge.)

Mr. Carr: Your Honor, we only do so so far as it is necessary. We have alleged that one of the elements of the tolling of the statute is to show the secreting of these particular acts, and the fact that all of the terms of this conspiracy, or part of the conspiracy, was to secrete it. We believe in this, that they, being co-conspirators, we have a right to introduce any statement from any of these conspirators which would tend in any way to prove the secrecy and the cover-up which we allege in our complaint, and which is specifically denied by these defendants for purposes of this hearing.

Mr. Harrison: If the Court please, I think counsel has in mind something that was already passed upon by your Honor, which your Honor held was not admissible in this hearing.

Mr. Carr: No, excuse me. The matter has never come up [126] except——

The Court: Counsel made rather a full statement of what he has in mind, and on the strength of that I have no hesitancy in ruling that it is wholly incompetent, irrelevant, and immaterial in this proceeding, and I am going to direct the jury to disregard it and disregard the statement of counsel. I have already told the jury and counsel that the merits of this matter are wholly extraneous. The plaintiff may have a good cause of action or he may have a bad cause of action, and we are not concerned with that. I am not going to permit the jury to try that issue, because that is not before them, and any attempt to get it before them only



(Testimony of William Arthur Gauge.)

causes the introduction of extraneous issues and would cause the verdict of the jury to be based upon matters that should not be considered by the jury, and it would be abortive of the processes of justice, and I am just not going to allow it. I will sustain the objection.

Mr. Carr: May I make one comment, if your Honor please? One of the essentials of our proceeding in this particular hearing is to prove that the defendants did cover up the situation, and we so allege in our complaint, and they have specifically denied it. Now, if we can introduce evidence to show that there was a cover-up——

The Court: That may have to do with the conspiracy, but the issue in this case is whether or not, as you have alleged [127] it, there is any unlawful concealment as to the cause of action of this plaintiff, and that entails transactions between the plaintiff and the defendants and not between third parties and the defendants.

Mr. Carr: Oh, excuse me, your Honor, may I read you some authorities of the Supreme Court of the United States? I would ask then that the jury be excused.

The Court: We have considered this matter before, Mr. Carr.

Mr. Carr: Not this part.

The Court: I will sustain the objection.

Mr. Carr: May I make a tender and offer of the evidence?

(Testimony of William Arthur Gauge.)

Mr. Harrison: I suggest that it be done in the absence of the jury.

Mr. Carr: I ask that the jury be excused so I might make my tender.

The Court: I will have the jury take its recess a little earlier today. Ladies and gentlemen, you may be excused for a brief period. Please bear in mind the admonition of the court.

(The jury retired from the courtroom and the following proceedings were had in the absence of the jury:)

Mr. Carr: Shall I proceed?

The Court: You may state what you wish to prove by this witness. [128]

Mr. Carr: May I state preliminarily what we wish, of course, to prove is the intent and the plan of the defendants to prevent anybody or any third party, any party to this proceeding or any third party, from knowing or learning of this conspiracy, which is, of course, the basis of our present action. We believe that any evidence which we can offer and which will show that it was the plan of these defendants to conceal, and it was their scheme and their general plan, we are entitled so to do, and that any statement——

The Court: Mr. Carr, there is no use of your arguing that. I have had many of these cases, and I am familiar with the law on that. Of course, all conspiracies are secret. They are all in the dark. That is why they are called conspiracies. You are

(Testimony of William Arthur Gauge.)

not entitled to present on this issue of the statute of the limitations the fact that the defendants had a secret conspiracy, because that is what you charge them with in the complaint. That is what conspiracies are. That is entirely irrelevant to the issue upon which you have demanded a jury trial, as to the question of whether or not the statute of limitations applies. I am not unfamiliar with the law that you are speaking of, but we are not trying the case now.

Mr. Carr: No, your Honor, but we are trying the statute of limitations, and one of the elements of the tolling of the statute is the secretiveness of the defendants. [129]

The Court: I do not agree that there is any such law. If you can cite me any case that would authorize this issue to be determined on the basis of general evidence that the conspiracy was a secret one, unless in some manner that is brought home to the plaintiff, then I will change my ruling.

Mr. Carr: How could it be brought home to the plaintiff?

The Court: Mr. Carr, I think it is folly to argue this matter. I understand what your point is, and I am aware of what you are endeavoring to do. I am not going to permit evidence to go to the jury in this case that pertains to the merits of the case, and on that basis have them bring in a verdict that has nothing to do with the special issue which is presented to them. It is folly to do that, because in my opinion that would not be proper administration of the judicial process in this case. I am fully



(Testimony of William Arthur Gauge.)

aware of what you are endeavoring to do, and I am not going to permit that evidence to go to the jury.

Mr. Carr: May we then offer, if it please your Honor, a letter signed by J. M. Gerstley to Mr. W. Gauge, 340 Bush Street, this city, dated June 27, 1934?

Q. Mr. Gauge, did you receive this letter?

The Court: This is only an offer of proof.

Mr. Carr: Only an offer of proof.

The Court: I think you had better make it, yourself. It is not necessary for you to have the witness testify. You [130] just state what you want to prove by this witness.

Mr. Carr: We will prove by this letter that this letter was written by the Pacific Coast Borax Company, by J. M. Gerstley, and in it states:

“Herewith confirmation of our telegram of today’s date, giving you London’s reply to the request made by Iwai & Company, Agents of your San Francisco friends, for permission to make sales up to the end of this year, which situation we discussed with you over the telephone on Monday, June 25th, after you had telegraphed us on the same date. As you had already discussed the matter with our mutual friends in San Francisco, we thought we would ask you to telephone them regarding London’s cabled reply, as we do not like to put such matters in writing for obvious reasons, and we trust you did not mind our imposing on your good nature and kind cooperation to this extent.”

(Testimony of William Arthur Gauge.)

The rest of the letter has no reference particularly to what I had in mind.

We also offer, if it please your Honor, a letter from the Pacific Coast Borax Company, dated Los Angeles, October 4, 1934, from Pacific Coast Borax Company, by J. M. Gerstley, Assistant to the Vice President, and reading in part as follows. This letter is headed, "Special Delivery."

"I have a great number of matters to discuss with [131] you and expect probably to be in San Francisco sometime around the middle of next week for a day or so, although I do not actually know when, as yet. I would appreciate your advice as to whether you expect to be in San Francisco at that time, so that as soon as I know when I may be coming I can telegraph you and arrange appointment with you."

With your Honor's permission I will come down to the part which I have in mind. (After perusing the letter.) I withdraw that particular offer.

Then the next one is a letter on the letterhead of the Pacific Coast Borax Company, addressed to Mr. W. Gauge, 340 Bush Street, and signed by Pacific Coast Borax Company, by J. M. Gerstley, and marked "Private," and also "No file copy," and it states:

"In accordance with our conversation in San Francisco recently, I am enclosing herewith translation of a short article which appeared in

(Testimony of William Arthur Gauge.)

the Osaka Yakuhim Shimbun, issued February 24th. This is the article that we feel must have been definitely prompted by some utterances given the press or otherwise by somebody connected with Toa Shoji in Japan. Your comments would be appreciated."

This is the paragraph I have reference to:

"I suggest that it would be as well to destroy this letter after perusal, merely passing on to Japan the articles in question with your own carefully worded comments." [132]

That is the one we had reference to. That is May 10, 1935, and that is the one that is marked "No file copy." "Private."

Then this was the final one. I wish to offer a letter which is in the longhand of Mr. Gerstley. It does not bear any date, but we are in a position to prove that it was written about July 8th or 9th, somewhere in that neighborhood, 1937, and this letter reads:

"Re the attached—neither Stauffer's nor Trona's agents had the desired clause in contract. That is why we were blocked our arrangements——"

Q. Maybe you had better read this.

Mr. Harrison: There should not be any testimony, Mr. Carr, unless we have an opportunity to object.



(Testimony of William Arthur Gauge.)

Mr. Carr: I am offering to introduce this letter in evidence, and the salient part of it I can read. I think I can make that out. It says:

“I am returning these letters to you as I do not want them on our files. I think, and so does P.M.J., that our letters to each other should not refer to agreements, gentlemen’s or otherwise, other than Western Contractor, unless in notes like this. I suggest you ‘lose’ your file copy of the attached letter. I have just received your longhand letter of July 7th. I’ve no idea about Takeda or Konishi. All I know is what we get from [133] London. We here have no direct dealings with B.M., so I will have to wait and see what London says. You can rest assured that anyone——” it looks like “representing our company is trying to get duties reduced in Japan is talking through his hat. Obviously we’re interested in no duties in Japan. If you can’t see that, I will be glad to explain when I see you, but I think you can see the point. My official letter today was written with one eye on the records and the other one on your people in Japan. So don’t think anything I said amiss. I couldn’t leave your letter on the file without a reply.

Best regards,” and the initials. Accompanying that offer is also the original letter which Mr. Gerstley refers to in this letter, and which Mr. Gauge wrote to them. We desire to offer those.

(Testimony of William Arthur Gauge.)

The Court: The letters may be marked as part of your offer in evidence.

Mr. Carr: I have photostatic copies of these. Inasmuch as we will desire these in other matters, may I substitute photostatic copies?

The Court: Very well.

Mr. Harrison: To which we object on the ground that they are incompetent, irrevelvant, and immaterial, having nothing to do with the issue before the jury, and prejudicial.

The Court: Counsel has made his offer of evidence, so he [134] has protected his record. The Court holds it is incompetent, irrelevant, and immaterial. It has to do with the question of the merits of the case. You may mark these as exhibits in connection with the offer of evidence, by way of knowing what counsel has offered in evidence.

Mr. Harrison: But they are not in evidence.

The Court: They are not in evidence in the case. You may mark them Plaintiff's Exhibit 2 as part of plaintiff's offer of evidence.

Mr. Harrison: They are only marked for identification in connection with that offer?

The Court: That is right. They are marked for identification only in connection with the offer in evidence. I think that makes the record clear.

(The documents in question thereupon marked Plaintiff's Exhibit 2 For Identification in connection with the Plaintiff's offer of proof.)

(Testimony of William Arthur Gauge.)

Mr. Carr: May I offer each one?

The Court: You have read them. I think you can include them in one identifying exhibit number.

Mr. Harrison: Have you copies of those?

Mr. Carr: No, I have not, except my one copy, which I should like to keep.

The Court: Mr. Carr, the jury is not present, so we may save ourselves further time and effort in this case. The fact [135] that I have ruled against your various offers has nothing to do with my view as to the merits of this case. Your client may have a good cause of action against the defendants in the case. I am not unfamiliar with the case. I have had the equity case, as you know, and any man is entitled to his day in court, but we have a specific, precise question here that is being submitted to the jury, and it is just as important that stale claims be not presented as a matter of law as it is that a man who has a meritorious cause of action be allowed his day in court, and the only question before us—we have discussed this matter many times before—is whether or not there is the factual basis for bringing this cause of action at this late date. That is the only question that is being presented. You have requested a jury trial in this case, which is your right, as to this special issue, and you have it; but we cannot convert this trial into a trial of the merits of the case, and the fact that you tried to get in evidence to show that the defendants were guilty of secret and unlawful acts might be helpful to you via the route of innuendo, to get a verdict of the jury, I can't permit it,



(Testimony of William Arthur Gauge.)

because that is not the issue that is to go before the jury. We must confine ourselves to the specific question, and that is the reason for my rulings. I want to make that quite clear to you so we may know where to go from now on.

Mr. Carr: I would like, with your Honor's permission, to [136] correct a statement that you said, that we are trying to get these things before the jury by innuendo. I assure you that is not the fact.

The Court: Mr. Carr, I am familiar enough with the case to know that there is all kinds of evidence besides these few documents on the question of conspiracy, and whether or not the defendants were guilty or not guilty of that conspiracy. The court impounded, if I remember rightly, a large amount of evidence on the subject, and you might just as well bring in all that evidence to show the secret nature of the conspiracy and what the nature of the conspiracy was. That would not be material to the present issue.

Mr. Carr: I would like to disagree with your Honor that we are trying to raise anything by innuendo. Our thought, and as we read it from the authorities, is——

The Court: Mr. Carr, I am not criticising you as an attorney. You are going to do everything you can to aid the cause of your client. I am simply ruling it is immaterial.

Mr. Carr: I know, but your Honor said if I could show you that the question of secrecy was involved in this question of the statute, you would

(Testimony of William Arthur Gauge.)

change your ruling. Now, that was established in the Kimball case, and in the Pashley case, the Bear Film case, and in the Hobart case, and they all held that where the fraud, and that in this case would be the conspiracy to violate the law, is concealed——

The Court: Mr. Carr, if that was the case, then any conspiracy that was a secret conspiracy could be made the basis of a cause of action by anyone aggrieved at any time, whenever he discovered it, even if it was fifty years afterwards, and there is no such law as that.

Mr. Carr: Excuse me, your Honor. It is the question of concealment, as I read the law. Until a person is aware of his rights, the statute cannot run against him.

The Court: I have submitted this special issue to the jury as to whether or not the plaintiff knew or had cause to believe that he had a cause of action for damages by reason of acts of the defendant. Now, any act of unlawful concealment that was with respect to the plaintiff's cause of action might be material in the case, but not the acts of conspiracy within themselves that of necessity are secret, and that pertain to the conspiracy, itself. I have read all the case you have referred to and I must disagree with you as to the statement you just made. I am going to take a five-minute recess and then we will bring the jury in.

Mr. Carr: May the witness be excused? He has been under subpoena.

The Court: Yes.

(Recess.)





